

KF 27

.J8565

1995f



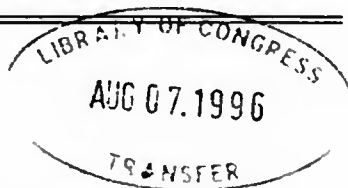






AUTHORIZATION OF THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

United
"



HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

JULY 20, 1995

Serial No. 64



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

25-484 CC

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-052835-6

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

CARLOS J. MOORHEAD, California
F. JAMES SENSENBRENNER, JR.,
Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
STEVEN SCHIFF, New Mexico
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB INGLIS, South Carolina
BOB GOODLATTE, Virginia
STEPHEN E. BUYER, Indiana
MARTIN R. HOKE, Ohio
SONNY BONO, California
FRED HEINEMAN, North Carolina
ED BRYANT, Tennessee
STEVE CHABOT, Ohio
MICHAEL PATRICK FLANAGAN, Illinois
BOB BARR, Georgia

JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JOHN BRYANT, Texas
JACK REED, Rhode Island
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
XAVIER BECERRA, California
JOSE E. SERRANO, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas

ALAN F. COPPEY, JR., *General Counsel/Staff Director*
JULIAN EPSTEIN, *Minority Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION

CHARLES T. CANADY, Florida, *Chairman*

HENRY J. HYDE, Illinois
BOB INGLIS, South Carolina
MICHAEL PATRICK FLANAGAN, Illinois
F. JAMES SENSENBRENNER, JR.,
Wisconsin
MARTIN R. HOKE, Ohio
LAMAR SMITH, Texas
BOB GOODLATTE, Virginia

BARNEY FRANK, Massachusetts
MELVIN L. WATT, North Carolina
JOSE E. SERRANO, New York
JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado

KATHRYN A. HAZEEM, *Chief Counsel*
WILLIAM L. MCGRATH, *Counsel*
KERI D. HARRISON, *Assistant Counsel*
JOHN H. LADD, *Assistant Counsel*
ROBERT RABEN, *Minority Counsel*

KF27
.J8565
1995f

CONTENTS

HEARING DATE

July 20, 1995

Page
1

OPENING STATEMENT

Canady, Hon. Charles T., a Representative in Congress from the State of Florida, and chairman, Subcommittee on the Constitution

1

WITNESSES

Bolick, Clint, vice president and litigation director, Institute for Justice
Patrick, Deval L., Assistant Attorney General, Civil Rights Division, Department of Justice

46

2

Pendley, William Perry, president and chief legal officer, Mountain State Legal Foundation

57

Shaw, Theodore M., associate director and counsel, National Association for the Advancement of Colored People, Legal Defense and Education Fund

54

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Bolick, Clint, vice president and litigation director, Institute for Justice: Prepared statement

48

Patrick, Deval L., Assistant Attorney General, Civil Rights Division, Department of Justice: Prepared statement

8

Pendley, William Perry, president and chief legal officer, Mountain State Legal Foundation: Prepared statement

59

APPENDIX

Department of Justice submissions to Representative Edward R. Royce's questions

83

AUTHORIZATION OF THE CIVIL RIGHTS DIVISION OF THE DEPARTMENT OF JUSTICE

THURSDAY, JULY 20, 1995

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.***

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2237, Rayburn House Office Building, Hon. Charles T. Canady (chairman of the subcommittee) presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Bob Inglis, F. James Sensenbrenner, Jr., Martin R. Hoke, Bob Goodlatte, Barney Frank, Melvin L. Watt, José E. Serrano, John Conyers, Jr., and Patricia A. Schroeder.

Also present: Representatives Robert C. Scott and Edward R. Royce.

Staff present: Kathryn A. Hazeem, chief counsel; William L. McGrath, counsel; Jacqueline McKee, paralegal; and Robert Raben, minority counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY. The subcommittee will come to order.

This hearing of the subcommittee today is being held at a particularly timely moment, coming as it does immediately after the President's speech yesterday on the issue of affirmative action and race and gender preferences. Our first witness today played a leading role in the administration's affirmative action review and will play a leading role in continuing to implement the administration's policies in this area.

Concerning the President's speech yesterday, this morning's Washington Post reported that the thrust of the speech was a full-throated endorsement of government preference programs. I believe that the Washington Post accurately described the President's statement. It is clear that the administration is committed to policies which grant preferential treatment on the basis of race and gender. In setting forth that position, I believe that the administration has missed an opportunity, an opportunity to stand up for the principle of nondiscrimination; that is, the principle that race and gender are irrelevant characteristics that should not be taken into account by the Government.

With that observation, I would ask if any of the other members have an opening statement.

[No response.]

Mr. CANADY. Our first witness today is the Honorable Deval Patrick. Mr. Patrick is the Assistant Attorney General for Civil Rights at the U.S. Department of Justice. Prior to his confirmation, Mr. Patrick was with the Boston law firm of Hill & Barlow. He also served as a director and member of the executive committee of the NAACP Legal Defense and Educational Fund.

Mr. Patrick, we're very pleased to have you with us today and we look forward to your testimony.

STATEMENT OF DEVAL L. PATRICK, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. PATRICK. Thank you, Mr. Chairman. May I proceed?

Mr. CANADY. Please proceed.

Mr. PATRICK. Mr. Chairman and members of the subcommittee, my thanks for having me today to present the authorization request for the Civil Rights Division for fiscal year 1996. We have a written statement which I'd ask be submitted for the record.

Mr. CANADY. Without objection, your entire statement and the statement of all the other witnesses today will be included in the record.

Mr. PATRICK. Great. If you please, Mr. Chairman, I'd just like to give a short oral statement to start us off.

Mr. CANADY. Please proceed.

Mr. PATRICK. I know you've been trying to get this hearing scheduled for some time now, and I'm glad to be here to talk over the Division's work. I come to you on behalf of 500 career professionals, more than 500 career professionals—lawyers, paralegals, clerical workers, and technicians—people who work long hours and under difficult conditions in service of the American people, enforcing some of our Nation's most important laws.

For fiscal year 1996, the Division has requested \$65.3 million. This represents an essentially flat-line budget. We've requested no enhancements. We've absorbed modest FTE cuts, and we've made savings in procurement and retirement benefits. At the same time we've taken on substantial new responsibilities under the 1994 crime bill, the National Voter Registration Act, and the Freedom of Access to Clinic Entrances Act. This we believe is, nonetheless, the most responsible balance to strike in these budgetary times between a viable program and fiscal restraint.

Because this is my first opportunity to testify in an authorization hearing and because I know some of the committee's membership is almost as new as I am, I'd like to provide the subcommittee a little background on the Division and its work. Too often for my taste the work of the Civil Rights Division is mischaracterized or misunderstood in the public arena. At our core we are a law enforcement office dedicated to full and fair enforcement of the law. Our job is to enforce the civil rights laws as written by the Congress and as interpreted by the courts.

In that sense, Congress makes the broad policy determinations and the courts tell us what Congress meant. We tell courts how we think a particular law should apply to a particular set of facts, as those of you who are lawyers here know, but the courts generally make the final judgment. Most of the laws we enforce originated right here in this subcommittee. These laws prohibit dis-

crimination on the basis of race, color, religion, sex, national origin, and disability, among others. Their protections extend to such activities as voting, education, employment, housing, the use of public accommodations and access to reproductive health services.

Regrettably, the need for vigorous enforcement of civil rights laws is as great as ever. No decent American could be other than astonished and saddened, if not repulsed, by the incidence of injustice, discrimination, and even violence motivated by race, ethnicity, religion, gender, or disability that cross my desk in droves every day. These unfortunate occurrences still block access for far too many individuals to the bounty of opportunity that America has to offer. My job, and I believe the job of all us in public life, is to strive to ensure that individuals have an opportunity to accomplish according to their abilities and can achieve in ways that are commensurate with their efforts.

When you consider where we as a nation have come from and the simple fact that we have been making a concerted effort only during my own young lifetime, the progress we have made is extraordinary, and America really is a model to the world. That's a thing for all Americans to celebrate and be proud of, but, as the President said yesterday, our work is far from done. Examples of the discrimination that still occur in this Nation abound.

In March we indicted three men in Lubbock, TX, who, according to the indictment, drove to the predominantly black section of that city literally hunting African-Americans. They lured three black men to their car and then shot them at close range with a short barrel shotgun. White officers in a city police department in Florida admitted that the police department did not hire a black applicant for 30 years, regularly used racial epithets in the workplace, and routinely threw applications from qualified blacks in the trash.

In a Louisiana corrections center the minimum passing score on the required written examination was 90 for men but 105 for women. In fact, one woman scored 100 on the exam but was disqualified while a year later a male applicant scored a 79 and was hired, this despite the fact that he had a prior arrest and didn't have the required high school diploma.

In a California case not long ago, two young hispanic couples with steady employment decided to move literally across the tracks into a condominium in a better neighborhood free of gang activity and drug traffic. When the condominium manager discovered that Latino residents were moving in, he told the real estate agent that he didn't welcome their presence because Latinos, as he put it, were given to multiplying and he didn't want his building to become like the barrio across the tracks. The couples began their housing search anew and carried with them the intense pain of prejudice and rejection. All they wanted was to raise their family in a decent place like any other parent.

And 40 years after *Brown v. Board of Education*, discrimination and segregation even in education remain. A couple of years ago, a cash-poor local school district spent a million dollars to expand the capacity of an elementary school whose student body was entirely white rather than send white students to a predominantly black elementary school that was one-third empty and that was only 800 yards away. Last year schoolbuses in one school district

were traveling down the same roads through the same neighborhoods, one bus picking up white children, the other picking up black children.

Recently, we intervened in a case where a woman wanted to attend her nephew's trial. This woman uses a wheelchair, but the judge would not allow her to use the only accessible entrance. When she managed to get in, she asked for permission to go to the restroom at one point during the trial, but the judge refused; he thought it would be too distracting. The woman ended up urinating on herself right there in the courtroom.

Combating these and other compelling cases of discrimination has been an interest and a commitment of the Federal Government since President Eisenhower created the Civil Rights Division in 1957. Our primary responsibility is to litigate cases of discrimination on behalf of the United States. In doing so, in most cases we receive referrals from other agencies after they have failed to work out an administrative solution. We also work closely and well with the able core of U.S. attorneys.

Let me briefly review some of the highlights of the Division's substantive work over the last year. The Division remains strongly committed to the vigorous prosecution of criminal violations of the civil rights laws. In fiscal year 1994 the Division filed 76 new criminal cases charging 139 defendants, both record numbers. The criminal section's 90.2 percent success rate last fiscal year was its second highest in history, and we expect to exceed that rate this year.

The Division doubled the number of defendants charged in cases of race-motivated violence. This violence included assaults, firebombings, and property damage. In addition, the Division obtained convictions against several law enforcement officers for physical and sexual assaults against suspects and prison inmates. We also obtained a conviction under the Freedom of Access to Clinic Entrances Act against Paul Hill for the brutal slaying of a physician and his escort at a reproductive health services clinic in Pensacola, FL, last summer. We've brought other criminal FACE cases against well over a dozen defendants who engaged in blockades, threats and acts of force designed to prevent access to reproductive health services, and in every case without infringing anyone's freedom lawfully to express opposition to abortion.

The Division has made attacking housing and lending discrimination under the Fair Housing Act and other laws one of its highest priorities. In fiscal year 1994, the Division filed a record number of new cases under the amended Fair Housing Act. We've obtained extensive injunctive and monetary relief under the act, including a pool of over a million dollars to compensate proven victims of discrimination uncovered through our testing program. We've also obtained settlements in six major cases involving discrimination either in lending or the provision of homeowners' insurance, bringing meaningful relief to communities redlined on account of race. We settled a nationwide public accommodations case as well, the Denny's case. Perhaps you've read about it.

One of the Division's most important missions is to ensure that all Americans enjoy a full and effective right to vote free from unlawful discrimination. The Division is fully and vigorously enforc-

ing the National Voter Registration Act. Approximately 1 million new voters were registered in just nine States during the first 6 months from the act's effective date, creating an average increase in registration rates of over 500 percent. We've successfully defended Congress' authority to enact the NVRA, and we have vigilantly and successfully sought injunctions against the few States that have chosen to defy the law.

We've also been involved in litigation to determine the lawful limits of a State's consideration of race in redistricting. As you know, two terms ago in *Shaw v. Reno* the Court held that race could lawfully be considered when a State draws congressional districts, but that they must withstand strict scrutiny under the Constitution when the districts are bizarrely shaped. On June 29, the Supreme Court decided *Miller v. Johnson* in which the Court held that where race was the predominant factor in the drawing of congressional districts strict scrutiny would also apply.

Mr. Chairman, can I go on just a bit more?

Mr. CANADY. Yes, please proceed. We'll—

Mr. PATRICK. For background, I think it may be of value.

On the same day the Court dismissed a challenge to congressional redistricting in Louisiana on standing grounds, agreed to hear arguments next term in redistricting cases from Texas and North Carolina, and held summarily that California congressional and State house redistricting plans with over 50 majority-minority districts was constitutional. We plan to remain active in these ongoing cases to ensure that all individuals are able without discrimination to fairly participate in the electoral process and have the chance to elect candidates of their choice.

The Division has placed a high priority on fully enforcing the Americans with Disabilities Act as well. Since the beginning of the Clinton administration, through an aggressive enforcement program, we have been successful on over 250 occasions through settlements, judicial decrees, or other means in improving access for disabled Americans.

The Division has also sought to promote voluntary compliance with the ADA by providing technical assistance regarding the act's requirements and engaging in extensive outreach efforts. For example, we've established a toll-free information line to advise State and local governments and small businesses on the ease and common sense of complying with the ADA. To that end, we've also placed reference materials in over 15,000 public libraries around the country and established outreach to chambers of commerce all over.

The Civil Rights Division is responsible for combating discrimination in employment by enforcing title VII of the Civil Rights Act of 1964. Our jurisdiction is limited to actions against State and local governments. As you know, the EEOC has jurisdiction over private employers as distinct from us in the Civil Rights Division.

During the Clinton administration we've filed 30 new lawsuits charging both individual discrimination and patterns or practices of employment discrimination, and in that same time we have also obtained orders providing injunctive and make whole relief for over 2,000 victims of discrimination, another Civil Rights Division record.

The Division continues to be responsible for cases challenging the vestiges of segregation in elementary and secondary education, as well as in State institutions of higher education. In the past year we obtained a judgment that promises finally to desegregate the schools in Darlington County, SC. We also entered into a consent decree bringing further desegregation relief to the Randolph County, AL, school district, where a high school principal threatened to cancel the prom if students planned to date others of a different race, and we entered into a consent decree desegregating Louisiana's public university system.

On June 12, the Supreme Court decided *Missouri v. Jenkins*, a challenge to the Kansas City school desegregation order. The Court held that attempting to attract white students back into Kansas City from suburban school districts was not a legitimate predicate for requiring the State to fund programs designed to improve educational quality. The Court held that to the extent that salary increases, educational improvements, and capital improvements within Kansas City were designed to make the district more attractive to white suburban students, they would not be permissible as part of a court-ordered plan in the absence of a finding of an interdistrict violation. The Court also stated that standardized test scores should not be used in most instances to measure the extent to which educational deficits had been remedied because too many factors unrelated to the effects of segregation on achievement affect test scores.

While we were disappointed with the Supreme Court's decision, it is not, and we will not read it to be, a devastating, longstanding national blow to efforts to remedy the vestiges of segregation in education. As a practical matter, we believe that the decision will not have a major impact on the Department's efforts to desegregate public schools wisely and practically.

The Division remains firmly committed to protecting the civil rights of institutionalized persons as well. That's another of our responsibilities. In cases challenging conditions at facilities for the mentally disabled in Pennsylvania and Tennessee, we entered into settlements that will improve conditions for over 1,200 residents. In response to widespread allegations of unlawful conditions, including a high incidence of suicide, we investigated 18 city and county jails throughout Mississippi. The majority of these investigations have resulted in comprehensive consent decrees.

Our Special Litigation Section is also responsible for civil enforcement of FACE, and we've brought actions in seven States seeking injunctive relief, damages, and civil penalties against individuals who have engaged in obstructive blockades of reproductive health facilities and who threatened violence to those who provide abortion services.

One of our responsibilities is to defend Federal affirmative action programs enacted by Congress or implemented by the agencies. To that end, the Division defended a constitutional challenge to the Department of Transportation's subcontracting compensation clause in the well-known *Adarand v. Peña* case which was decided by the Court on June 12.

The Court announced, as you know, that the Transportation Department program would be subject to strict scrutiny and sent it

back to the lower court for determination. Although the administration argued for the established legal standard of review, the Court made clear that the strict scrutiny standard leaves room for carefully crafted affirmative action programs. It's important to realize that the Court expressly rejected the notion that strict scrutiny is strict in theory but fatal in fact, noting that as recently as 1987 every member of the Court had endorsed consideration of race in crafting a remedy for discrimination.

I want to add, Mr. Chairman, that affirmative action is a relatively small part of our program. On the whole, we have deemphasized cases that are about affirmative action, which I view as a remedy, in favor of cases that are about the underlying discrimination, which I view as the real problem. Recognizing that this is not one of the subcommittee's several hearings on affirmative action, and that we have a range of other issues to address in limited time, I want to speak to this topic only briefly in light of the President's statement yesterday.

First, it should be clear to everyone now that the President supports Federal affirmative action that is fair. The President defines fairness as efforts to find and include the talents of qualified women and minorities where such an effort does not result in a strict numerical quota, does not compromise merit, does not produce unlawful discrimination, and is reviewable, so that it ends when the problems do. Those are limits placed on affirmative action both by the President's policy and by law. The goal is not affirmative action; the goal is equal opportunity. We believe that affirmative action done right is an effective tool to work toward that goal.

Second, we have a duty to see that existing applicable programs comply with the *Adarand* decision, and we intend to assume that duty. The President has directed the Justice Department to coordinate that task. We fully understand our role to requirement a thoughtful and unflinching analysis of the relevant facts and sometimes tough legal judgments. We know that some programs will have to end and that others may need to be reformed. I can assure you that under the leadership of the Associate Attorney General that task will be performed with dispatch and with integrity.

Mr. Chairman, that summarizes some of our recent activities very generally. Let me repeat that the Nation is blessed to be served by the dedicated professional and effective career staff in the Civil Rights Division. These are the folks who produce the ideas, not just the briefs, focusing on real problems and real people's lives rather than mere abstractions. They work extremely hard and extremely well, and I am honored to serve with them and proud of their accomplishments over the last year.

Let me close by observing that many in Congress profess strong opposition to discrimination and strong support for civil rights law, and I take them at their word. But to oppose discrimination in theory you must have vigorous enforcement in fact. We need strong and effective tools and reasonable resources to accomplish this. Based on our expanded responsibilities and the rising number of complaints, we could surely do more and ask for more to support this work, but in this time of budgetary constraints we've crafted our authorization request carefully and in a balanced way to pro-

vide effective civil rights enforcement in as lien a fashion as possible. I believe we can sustain and build upon our enforcement program with this essentially flat 1996 request. So I ask for your support, Mr. Chairman, and that of the subcommittee as a whole, in granting this request.

Thank you for the opportunity to be here, and I look forward to your questions.

[The prepared statement of Mr. Patrick follows:]

PREPARED STATEMENT OF DEVAL L. PATRICK, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear before the Subcommittee to present the authorization request for the Civil Rights Division for Fiscal Year 1996.

For Fiscal Year 1996, the Division has requested \$65.304 million. This represents an essentially flat line budget: we have requested no enhancements, we have absorbed modest FTE cuts and we have made savings in procurement and retirement benefits. At the same time we have taken on substantial new responsibilities under the 1994 Crime Bill, the National Voter Registration Act (NVRA), and the Freedom of Access to Clinic Entrances Act (FACE). This request, we believe, is the most responsible balance to strike in these times between a viable program and fiscal restraint.

Because this is my first opportunity to testify at an authorization hearing, I'd like to provide the subcommittee a bit of background. Too often, the work of the Civil Rights Division is mischaracterized or misunderstood in the public arena. At our core, we are a law enforcement agency, dedicated to full and fair enforcement of laws enacted by the Congress. It is as simple and straightforward as that.

The Civil Rights Division is the primary agency in the federal government charged with enforcing specific federal civil rights laws which have been assigned to us by the Attorney General. Most of these laws originated here in this Subcommittee. These laws prohibit discrimination on the basis of race, color, religion, sex, national origin, and disability, among others. Their protections extend to such activities as voting, education, employment, housing, the use of public accommodations, and access to reproductive health services.

The need for vigorous enforcement of civil rights laws is as great as ever. Regrettably, discrimination on the basis of race, ethnicity, religion, gender, and disability persists in this country: not just the effects of past discrimination, but current, real-life, pernicious discrimination. Last year, for example, the Federal government received over 91,000 complaints of discrimination in employment alone. In the Civil Rights Division, we filed record numbers of cases last year in many areas and opened thousands of new investigations.

No decent American could be other than astonished and saddened by the incidents of injustice, unfairness, and even violence motivated by race, ethnicity, religion, gender or disability that cross my desk daily. These unfortunate occurrences still block access for far too many individuals to the bounty of opportunity that America has to offer. My job—and the job of all of us in public life—is to strive to ensure that individuals have an opportunity to accomplish according to their abilities and can achieve in ways that are commensurate with their efforts. We all look forward to the day when unlawful discrimination is a thing of the past, but in spite of considerable progress, progress of which this country should justly be proud, that day has not yet arrived in our country.

Until just 40 years ago, America was racially segregated by both law and custom. Even after *Brown v. Board of Education*, it was many years before the nation began undertaking steps to eradicate Jim Crow in its most pernicious form. Efforts to address racial and ethnic discrimination against other Americans, many of whom have been on this continent for centuries, are also comparatively recent. And while there have been striking gains, the struggle of women to gain entry into many areas of employment and education traditionally closed to them continues.

The progress we have made on all of these fronts is extraordinary; America is a model to the world. That is a thing for all Americans to celebrate and be proud of.

But examples of the discrimination that still occurs in this nation abound. In March, we indicted three men in Lubbock, Texas, who, according to the indictment, drove to the predominantly black section of that city hunting African Americans, lured three black men to their car, and then shot them at close range with a short-

barreled shotgun. The three defendants passed the shotgun around and allegedly each took a turn shooting a black victim.

In February, two Missouri men pled guilty to criminal civil rights violations after driving into a black neighborhood of St. Louis, again hunting for African Americans to victimize. From the front seat of their car, while someone in the back seat videotaped their actions for amusement's sake, the two white men sprayed more than fifty African Americans with a high pressure fire extinguisher so strong it knocked some of the victims to the ground.

White officers in a city police department in Florida admitted that the police department did not hire a black applicant for 30 years, routinely threw applications from blacks in the trash, and regularly used racial epithets in the workplace, up to and including the Chief of Police himself.

In a Louisiana corrections center, the policy of not hiring women was unusually blatant. The minimum passing score on the required written examination was 90 for men, but 105 for women. In fact, one woman scored 100 on this written exam in April, 1987, but was disqualified, while a year later, a male applicant scored a 79 and was hired despite the fact that he had a prior arrest and did not have the required high school diploma.

In a California case not long ago, two young Hispanic couples with steady employment decided to move, literally, across the tracks into a condominium in a better neighborhood free of gang activity and drug traffic. When the condominium manager discovered that Latino residents were moving in, he told the real estate agent that he did not welcome their presence because Latinos were "given to multiplying." He said he did not want his building to become like the barrio across the tracks. Instead of suffering the pain of raising a family in such an ugly environment, the couples began their housing search anew, and carried with them the intense pain of prejudice and rejection. All they wanted was to raise their family in a decent place, like any other parent I know.

In order to combat these compelling cases of discrimination, the Civil Rights Division's primary responsibility is to litigate cases of discrimination on behalf of the United States. Civil rights offices in other Departments, such as Education, HUD and HHS, are responsible for administrative enforcement of certain civil rights laws, and we work closely with these other offices to avoid duplication and to maximize our enforcement resources. In many cases, they have responsibility for evaluating claims under certain statutes, first, and trying to work out an agreed resolution. If that fails, the matter is then referred to the Department of Justice for litigation.

Over the past several years, the Division has taken on major responsibilities for enforcing new laws passed by the Congress. Since 1994, the Division also includes the Office of Special Counsel for Immigration Related Unfair Employment Practices. While these new responsibilities were accompanied by some additional resources, the Division has done far more with fewer resources than in prior years. I am very proud of the work of the employees of the Division—they have taken on these new responsibilities with gusto and work extremely hard. The quality of their legal work is very high and reflects their dedication.

The Division also works closely with the 94 United States Attorneys and their Assistants on both criminal and civil matters. For example, we recently entered into a new understanding with the United States Attorneys to enable them to handle more criminal civil rights law enforcement independently, thus increasing the reach of civil rights law enforcement.

We also initiated and recently signed a memorandum of understanding with the National Association of Attorneys General (NAAG), the organization of state attorneys general, which will facilitate joint federal/state initiatives in the areas of housing discrimination, discrimination against individuals with disabilities, hate crimes, and lending discrimination. Through our renewed relationship, we are also working out a protocol for how we can most cooperatively deal with each other when we are adverse parties in a case.

Let me briefly review some of the highlights of the Division's substantive work over the last year.

CRIMINAL

The Division remains strongly committed to the vigorous prosecution of criminal violations of the civil rights laws. In Fiscal Year 1994, the Division filed 76 new criminal cases charging 139 defendants—both record numbers. The Criminal Section's 90.2% success rate last fiscal year was its second highest in history.

The Division doubled the number of defendants charged in cases of race-motivated violence (73). For example, in Indiana, four Ku Klux Klan members were charged with conspiring to interfere with the housing rights of a black couple who were as-

saulted in their apartment. The defendants yelled racial slurs and threats, broke windows, struck one of the victims with a stick and fired a gun at the victim's front door. After one conviction and three guilty pleas, the four Klan members received substantial prison sentences ranging from 90 to 264 months. In the State of Washington, three white-supremacist Skinheads pled guilty to conspiracy in the fire bombing of an NAACP office and a gay bar. Two of them also pled guilty to several explosives and firearms violations stemming from the fire bombings.

In addition, the Division obtained convictions against several law enforcement officers for physical and sexual assaults against suspects and prison inmates.

Finally, we obtained a conviction under the Freedom of Access to Clinic Entrances Act (FACE) against Paul Hill for the brutal slaying of a physician and his escort at a reproductive health services clinic in Pensacola, Florida. We have brought criminal FACE cases against more than a dozen defendants who engaged in blockades, threats, and acts of force designed to prevent access to reproductive health services, while carefully balancing and consistently respecting the right of abortion opponents freely and peacefully to express their views.

HOUSING AND PUBLIC ACCOMMODATIONS

The Division has made attacking housing and lending discrimination, under the Fair Housing Act and other laws, one of its highest priorities. In Fiscal Year 1994, the Division filed a record 176 new cases under the amended Fair Housing Act. That exceeded the previous record—set in the prior fiscal year—by nearly 40%.

As a result of our new fair housing testing program—the first of its kind in any federal agency—we have obtained extensive injunctive relief and a pool of over \$1 million to compensate proven victims of discrimination in a number of cases.

We have also obtained effective settlements against redefining and other discriminatory lending practices in six major cases involving lending and insurance institutions. These settlements will provide compensation for approximately 350 individual victims of discrimination, as well as injunctive relief to prevent such practices from recurring in the future.

Working with private plaintiffs, the Division joined in the settlement of major public accommodations litigation against the Denny's restaurant chain. In addition to substantial monetary relief for individual victims of discrimination, the settlement included significant provisions to prevent future discrimination.

VOTING RIGHTS

One of the Division's most important missions is to ensure that all Americans enjoy a full and effective right to vote, free from unlawful discrimination under the Voting Rights Act.

The Division is fully and vigorously enforcing the National Voter Registration Act (NVRA)—the so-called "Motor Voter" law. Thanks in large measure to its passage and our enforcement, the average increase in voter registration since last year at this time is about 500%. In nine states, almost one million newly registered voters were added during the first six months of 1995 alone. We have successfully defended Congress's authority to enact the NVRA, and we have vigilantly sought injunctions against the few states that have chosen to defy the law. NVRA litigation is currently underway in California, Illinois, Pennsylvania, South Carolina and Virginia. In the California, Illinois and Pennsylvania cases—the only ones yet decided by district courts—we obtained orders declaring the NVRA constitutional and directing the state to implement the law. The Seventh Circuit Court of Appeals upheld the district court decision in Illinois.

In fulfilling our preclearance responsibilities under Section 5 of the Voting Rights Act, and our affirmative litigation responsibilities under the amended Section 2 of the Act, we have sought to ensure that the redistricting plans adopted following the 1990 census did not deny minority voters an equal opportunity to elect the candidates of their choice. We also brought a number of successful cases to enforce the minority language provisions of the 1992 Voting Rights Amendments, and have organized a special Task Force within the Voting Section to address that effort.

On June 29, the Supreme Court decided *Miller v. Johnson*, in which we joined with the State of Georgia in defending a redistricting plan against claims that it was an unconstitutional so-called "racial gerrymander." In *Miller*, the Court held that where race was the "predominant" factor in the drawing of congressional districts, strict scrutiny would apply, thus apparently extending strict scrutiny beyond "bizarrely shaped" districts—as the Court held in *Shaw v. Reno*—to all redistrictings in which race is a factor so predominant that it subordinates other traditional districting considerations.

But, on the same day, the Court dismissed a challenge to congressional redistricting in Louisiana on standing grounds, agreed to hear arguments next term in redistricting cases from Texas and North Carolina, and held summarily that California congressional and state house redistricting plans—with over 50 majority-minority districts—was constitutional. We plan to remain active in these ongoing cases, to ensure that minority voters are able, without discrimination, to fairly participate in the electoral process and have the chance to elect candidates of their choice.

DISABILITY RIGHTS

The Division has placed a high priority on fully enforcing the Americans with Disabilities Act (ADA), a comprehensive civil rights law for people with disabilities. We have created a new Disability Rights Section, which will handle most of the Division's responsibilities for enforcing the laws protecting the rights of people with disabilities, including the ADA's provisions regarding nondiscrimination in public employment, access to government services, and access to public accommodations.

Since the beginning of the Clinton Administration, through an aggressive enforcement program, we have been successful on over 250 occasions—through settlements, judicial decrees, or other means—in improving access for disabled Americans. For example, we entered into formal settlement agreements with the cities of Los Angeles and Chicago in which the cities agreed to take major steps to make their 911 emergency telephone services more accessible to people who use telecommunication devices for the deaf.

The Division has also sought to promote voluntary compliance with the ADA by providing technical assistance regarding the Act's requirements and engaging in extensive outreach efforts. Our purpose is to demonstrate how reasonable and effective this law is by design and in practice. For example, we have operated a toll-free ADA Telephone Information Line, which receives more than 2,000 calls per week. We have placed an ADA Information File in 15,000 public libraries and universities throughout the country. We have mailed letters to the mayors of the nation's 250 largest cities, providing information regarding effective communication requirements for 911 emergency telephone services. And finally, we have distributed over 90,000 ADA Questions and Answers Booklets nationally.

EMPLOYMENT DISCRIMINATION

The Civil Rights Division is responsible for enforcing Title VII of the Civil Rights Act of 1964 with respect to state and local governments. During the Clinton Administration, we have filed 38 new lawsuits charging both individual discrimination and patterns or practices of employment discrimination. In that same time, we have also obtained orders providing injunctive and make-whole relief for over 2,000 identified victims of discrimination. We still see examples of rank discrimination based on race and gender in public employment and we intend to keep this focus sharp.

The Division defended a constitutional challenge to the Department of Transportation's subcontracting compensation clause. That case, *Adarand v. Peña*, was decided by the Court on June 12. Although the Court's holding was disappointing, it certainly does not signal the end of affirmative action. The Court has now set forth the standard to meet in these types of cases, the strict scrutiny standard. Although the Administration argued for a different standard of review under the law, the strict scrutiny standard leaves considerable room for carefully crafted affirmative action programs.

I'd like to emphasize for the Subcommittee an important aspect of *Adarand* that is too often ignored. The Court expressly rejected the notion that strict scrutiny is "strict in theory, but fatal in fact," noting that as recently as 1987 every member of the Court had endorsed consideration of race in crafting a remedy for discrimination.

The *Adarand* decision—which supports the notion that government can continue to conduct affirmative action programs, but cautions that it must do so thoughtfully and carefully—does not conflict with the Administration's careful review of affirmative action programs to ensure that they remain warranted and are carefully tailored to satisfy their purposes.

EDUCATIONAL OPPORTUNITIES

The Civil Rights Division continues to be committed to eliminating the vestiges of segregation in elementary and secondary education as well as in state institutions of higher education.

In the past year, we obtained a judgment that will desegregate the schools in Darlington County, South Carolina. We also entered into a consent decree regarding our claim that the Randolph County, Alabama, school district—where a high school

principal threatened to cancel the prom if interracial student couples planned to attend—was violating longstanding desegregation orders.

We also continued our challenges to the separate higher education systems in Mississippi and Alabama, and we entered into a consent decree desegregating Louisiana's public university system for the first time in history.

On June 12, the Supreme Court decided *Missouri v. Jenkins*, a challenge to the Kansas City school desegregation case. The Court held that attempting to attract white students back into Kansas City from suburban school districts was not a legitimate predicate for requiring the State to fund programs designed to improve educational quality. The Court held that, to the extent that salary increases, educational improvements and capital improvements within Kansas City were designed to make the district more attractive to white suburban students, they would not be permissible as part of a court-ordered plan absent a finding of an interdistrict violation. The Court also stated that standardized test scores should not be used in most instances to measure the extent that educational deficits have been remedied because too many factors unrelated to the effects of segregation on achievement affect test scores.

While we were disappointed with the Supreme Court's decision, it is not—and we will not read it to be—a devastating blow to our efforts to remedy the vestiges of segregation in education. We believe that the decision will not have a major impact on the Department's efforts to desegregate public schools.

SPECIAL LITIGATION

The Division remains firmly committed to protecting the civil rights of institutionalized persons, under the Civil Rights of Institutionalized Persons Act.

In cases challenging conditions at facilities for the mentally disabled in Pennsylvania and Tennessee, we entered into settlements which will ensure that more than 450 residents will be placed in more appropriate community-based programs and facilities. We also settled a case involving the Howe Developmental Center in Tinley Park, Illinois. This settlement, which provides for periodic monitoring by a panel of experts, will improve conditions for the Center's 800 disabled residents.

Earlier this month we entered into an agreement with District of Columbia officials to correct systemic deficiencies in the delivery of care and treatment to patients at D.C. Village, a nursing home housing approximately 250 individuals. The agreement addresses the most serious, life-threatening problems at the facility.

In response to widespread allegations of unlawful conditions, including a high incidence of suicide, we investigated 18 city and county jails throughout Mississippi. The majority of these investigations have resulted in comprehensive consent decrees.

The Special Litigation Section is responsible for enforcing the pattern or practice police misconduct provisions contained in last year's Crime Bill. The Section is also responsible for civil enforcement of FACE. We have brought actions in six states, seeking injunctive relief, damages and civil penalties against individuals who have engaged in obstructive blockades of reproductive health facilities, and who have threatened violence to those who provide abortion services.

COORDINATION AND REVIEW

The Coordination and Review Section's activities have been refocused on improving and reinvigorating the government-wide enforcement, under Executive Order 12250, of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and similar provisions of law that prohibit discrimination on the basis of race, color, national origin, sex, religion, and age in programs receiving Federal financial assistance.

The Section currently is implementing an action plan to promote the effective, consistent and efficient enforcement of Title VI and related statutes, as required by Executive Order 12250. This plan includes activities to develop and coordinate policy and compliance program development; to provide technical assistance and training; to promote interagency information sharing and cooperative efforts (including the publication of a quarterly civil rights periodical); and to monitor and evaluate individual agency compliance and enforcement programs.

The Section also assumed major new responsibilities for ensuring that the Department's own recipients of Federal financial assistance provide their programs and services in a nondiscriminatory manner.

OFFICE OF SPECIAL COUNSEL

Since Spring 1994, the Civil Rights Division has been home to the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC). OSC was

created to enforce the provision of the Immigration Reform and Control Act of 1986 which prohibits discrimination in hiring, recruiting, discharging or referring an individual for a fee because of national origin or citizenship status. It also investigates allegations of document abuse and retaliation as a result of the Immigration Act of 1990.

OSC receives and investigates charges of immigration-related employment discrimination and then determines whether the charges may be dismissed or settled or warrant filing an administrative complaint. OSC also conducts independent investigations, including possible pattern or practice violations. OSC may file a complaint with an administrative law judge seeking a cease and desist order and, where appropriate, back pay, civil monetary penalties, or both. When the administrative law judge finds a violation and orders relief, OSC may file an action in federal court to enforce the order.

In addition, OSC conducts an outreach and education program aimed at educating employers, potential victims of discrimination and the general public about their rights and responsibilities under the law's antidiscrimination and employer sanction provisions. As part of this program, OSC administers a grant program, and OSC staff participate in public outreach activities.

Mr. Chairman, that summarizes our activities over the past year. Let me say that the nation is blessed to be served by dedicated, professional and effective career staff in the Civil Rights Division. These are the folks who produce the ideas, not just the briefs, focusing on real problems in real people's lives rather than mere abstractions. They work extremely hard and extremely well. And I am honored to serve with them.

Let me close by observing that some in Congress have professed strong opposition to discrimination, yet, at the same time, have pushed legislation and amendments to cut back civil rights law. I believe these members when they say they are for strong civil rights laws. But I cannot understand how these same members can propose cutting back fundamental and long standing protections, such as the Attorney General's authority to bring cases against a pattern or practice of discrimination under the Fair Housing Act. I do not believe you can have it both ways. In order to oppose discrimination in theory, you must have vigorous enforcement in fact, and you need a strong and effective array of tools to address the problem.

I hope this testimony gives the Subcommittee a sense of the scope of the work of the Civil Rights Division. As the primary law enforcement agency for civil rights matters in the federal government, and based on the rising numbers of complaints, we could surely do more and ask for more to support that. But in this time of budgetary constraints, we have crafted our authorization request carefully and in a balanced way to provide effective civil rights enforcement. I believe we can sustain and to some extent build upon our enforcement program with this essentially flat 1996 request. And I believe we should. I ask for your support in fully granting this request.

Thank you for the opportunity to testify this morning. I look forward to answering any questions you may have.

Mr. CANADY. Thank you. Thank you, Mr. Patrick. We appreciate your testimony.

And we are, of course, always open to any suggestions that you may have about ways that we can assist you in carrying out your important responsibilities.

Mr. PATRICK. Thank you, Mr. Chairman.

Mr. CANADY. And I want to make clear that that covers the whole range of activities in which you're involved.

This hearing is not specifically to focus on the issue of race and gender preferences, but it is, I believe, true that one of the most important challenges and responsibilities you're going to be facing in coming days will be coming to terms with the decision of the Supreme Court in the *Adarand* case.

Mr. PATRICK. Absolutely.

Mr. CANADY. Now in your comments you indicated that there are some programs that will have to go or that will have to come to an end under the *Adarand* decision. Could you give me an example of a program which you believe will not be able to withstand the strict scrutiny required by the *Adarand* decision?

Mr. PATRICK. As I sit here right now, I won't give an example, Mr. Chairman. What *Adarand* requires, as you know, is a very careful scrutiny of facts and circumstances, legislative history and actual practice, and then an analysis of whether that program addresses a compelling government interest, as it has been defined by the courts and is narrowly tailored. We're going to do that in a systematic and serious way. The Associate Attorney General has begun the process, of consulting with the General Counsels of the agencies to flag these issues and begin to develop the necessary factual record. We have a case or two that have been filed after *Adarand* where that is going to surface sooner rather than later, and we are still in the process of evaluating programs and giving advice to our counsel, to our client agencies. But there's absolutely no question in anyone's mind that some of the programs have got to be improved and will have some changes made as a result of the *Adarand* decision, and that's entirely appropriate.

Mr. CANADY. OK. Well, I understand that, but you said, I believe, in your statement that some of them would have to end. Do you have any in mind? And, again, I understand that you have not exhaustively reviewed everything you need to review with respect to every program, but when you make a statement that indicates that some of them will have to end, it makes me think you may have some in mind. You have some—at least there are some circumstances and some factors related to some of those programs that are troubling in your mind and—

Mr. PATRICK. Sure.

Mr. CANADY. OK.

Mr. PATRICK. Oh, yes. I mean, that's what *Adarand* requires, as you know. *Adarand*, as a part of narrow tailoring means that you have to ask of each program a variety of questions, many of which were laid out in the memorandum that the Office of Legal Counsel distributed to the General Counsels shortly after the *Adarand* decision, to determine whether they are, in fact, fair, and that's a lay person's term, but I think a correct one for what the Supreme Court is trying to get at and what the President was outlining in his policy. Programs that do not have flexibility, if they do use numbers that appear to reflect quotas, either in theory or in practice, have to be dealt with. Programs that—

Mr. CANADY. So a program that uses—you said that uses numbers would be suspect?

Mr. PATRICK. A program that uses numbers in a way that is inflexible has to be dealt with, that's right—

Mr. CANADY. OK, let me ask—

Mr. PATRICK [continuing]. As a practical matter.

Mr. CANADY. OK, but you don't really have any particular example that in your review stands out as troubling?

Mr. PATRICK. I'm not going to get ahead of the process, Mr. Chairman, tempting though it is.

Mr. CANADY. But, well, let me see if I understand this correctly. As challenges are brought to particular programs, you will make a decision on a case-by-case basis as—

Mr. PATRICK. No.

Mr. CANADY [continuing]. To whether the programs are defensible? Are you going to defend all the programs or—

Mr. PATRICK. No. We're not waiting for the challenges to be brought. There's a two-tier process here. There is the responsibility for defending congressional programs which resides in the Justice Department, and where the case has been brought we obviously have to make a legal judgment about whether a given program is defensible and how it's to be defended, and we will make those judgments in the context of those cases. But the process that the Associate Attorney General is responsible for in the Department is a proactive one, and that follows the President's directive, which is to go out and evaluate each program in accordance with the terms of *Adarand* and make a determination whether a program has to be reformed or in some other way modified.

Mr. CANADY. Now in your comments you made reference to congressional findings. What role will prior congressional findings play in your evaluation?

Mr. PATRICK. Well, I think—

Mr. CANADY. Is it necessary that there be findings by the Congress to support the programs or will you engage in a process of coming up with the justification for the programs that is not based on congressional findings?

Mr. PATRICK. Well, as you know from the decision, the Court left open the question of what deference should be given to determinations by Congress that affirmative action in a particular case is necessary to remedy nationwide discrimination. It may not have to base such measures on evidence of discrimination in a geographic locale, but also on a variety of other qualifiers.

After the *Croson* decision, which I'm sure the Chair is familiar with, many State and local jurisdictions had to go back and evaluate the record at the time a given measure was enacted, and in some cases—

Mr. CANADY. My time has expired, but if there's no objection, I'll take an additional 3 minutes.

Mr. PATRICK [continuing]. And in some cases had to—

Mr. SERRANO. Without objection.

Mr. PATRICK [continuing]. In some cases had to go back and build a record. I think we're going to have to make those judgments on a case-by-case basis.

Mr. CANADY. So you think you can go back and build a record even though Congress did not have a record in enacting certain programs?

Mr. PATRICK. I think that's an open question.

Mr. CANADY. Let me read you something. Let me read you something from Justice O'Connor's opinion in *Croson*. She said—and this is, obviously, focusing on State and local programs, but the same principle may be applicable here.

"While the States and their subdivisions may take remedial action when they possess evidence"—when they possess evidence—"that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."

What's your reaction to that statement?

Mr. PATRICK. Well, my reaction is that that's the same thing the Court said in the *Croson* decision with—

Mr. CANADY. Well, that is what I read. That's from the *Croson* decision.

Mr. PATRICK. Yes. *Croson* is the only model by which we have to deal with these issues. In the aftermath of the *Croson* decision, in some cases State and local authorities had to go back and determine the record that reflected the reality at the time the program was enacted, and many courts, or some courts have said that that's appropriate in defense of a given program. But I think that's an issue that has to be worked out. It's a difficult question.

Mr. CANADY. Let me ask you about this, how you're going to proceed in this process. Now you're familiar with the whole process of disparity studies that have been conducted by local governments—

Mr. PATRICK. Generally, yes.

Mr. CANADY [continuing]. In the aftermath? Do you intend to pursue a strategy similar to that in defending programs and conducting similar studies?

Mr. PATRICK. Yes, I think it's really too soon for me to say, and I don't want to get ahead of the Associate Attorney General who is running this process, but I think judgment has to be made and it's got to be done seriously. Not every program is going to be suitable to defend, that's going to be worth defending, and there are going to be some cases where there may be a better way to accomplish the objective of addressing prior discrimination or including the talents of qualified minorities and women in Federal opportunities. I think that judgment has to be made as we go forward.

Mr. CANADY. Let me ask you this or let me tell you this: I've read in the Wall Street Journal that, and I quote, "The Justice Department is negotiating with the Commerce Department's Minority Business Development Agency for that agency to gather the research the lawyers will need to determine which Federal programs meet the test" adopted by the Court in *Adarand*. What is that about? What's going on—

Mr. PATRICK. I'm not entirely sure what that's about. I think the office is called the Minority Business Development Authority, and it has a great deal of statistical information that they gather on a regular basis that is going to be necessary for us to have in evaluating some of the programs that will be at issue.

Mr. CANADY. My additional time has expired, but—

Mr. PATRICK. Thank you, Mr. Chairman.

Mr. CANADY [continuing]. I want to pursue this line of questioning in our second round.

Mr. Serrano.

Mr. SERRANO. Thank you, Mr. Chairman.

As you know, Mr. Patrick, we've already stated that this is not a hearing about affirmative action, and I have a bridge I can sell you in Brooklyn if you believe that. [Laughter.]

This is, indeed, a time when that issue will be discussed and discussed over and over and over again, and I have to at the outset congratulate you for having the courage to want to accept this job in the first place and then to carry it out as you do on a daily basis.

Mr. PATRICK. It's early today, Mr. Serrano.

Mr. SERRANO. Well, and it's going to get much later come October, November, and December, or all of next year. But you do have

the support of many of us who feel that what you do is very, very important for this country—

Mr. PATRICK. Thank you.

Mr. SERRANO [continuing]. And that your Division, in fact, handles work that needs to be handled, work that some people would rather sweep under the rug. But those of us who are from this generation, the President's generation, were around to see times when on paper people were not equal and then were around when on paper people became equal, and when, in fact, people have not been treated equally even after they became equal on paper.

I can recall personally, unlike many of our younger members these days, the people who came in at the same time I did into Congress, serving in the military in a State in this Union 6 years after supposedly there were not supposed to be any separate water fountains anymore and finding men, young men in uniform, including myself, with choices of water fountains. And being a wise guy New Yorker, I asked which water fountain I should use, knowing exactly which one I wanted to use, and I was asked, "Well, why do you ask the question?"

And I said, "Because I'm a Puerto Rican."

And they said, "Well, what is that?"

I said, "Well"—I remember the gentleman at the bus depot said, "Is that like a Mexican or an Italian?" [Laughter.]

I said, "Well, it's neither, but I can tell you that I have a grandmother that could go to that fountain and I have a grandmother that could go to that fountain."

He said, "Well, that presents a problem."

While they left to go make a decision I drank from the colored water fountain anyway, as they had it written up in those days.

Some people in this country never got used to the fact that that changed on paper, and some people in this country never got used to the fact that people like you have been charged with the responsibility of seeing to it that people's rights are protected. And so your appearance today, and the many appearances you will be making in the future, will be part of that struggle. You should feel good—and I know you do, as I do—about the fact that our President took one of the more courageous stands that anyone could take. He didn't play to the talk show audiences; he didn't play to the talk show hosts; he didn't play to the anger of some males in this country, supposedly alleged anger. He played with the truth yesterday and he dealt with the truth, and that makes us feel very good about him.

And so I just need a sense from you as to whether you think that especially within the institution of higher education, which I care very much about, that the issues you have to deal with sometimes are those where people at that level are really trying to resolve them or whether, in fact, people are being difficult when you and other people have to reach out to try to solve them.

And I'm not speaking about the changes that will come, but I know that on a daily basis we still hear about very serious discrimination cases that affect a person's right to an education. Do you feel that in our society there are people still resisting the change or are they willing to work with you to bring about the proper changes?

Mr. PATRICK. Congressman, first of all, I appreciate your opening remarks. In response to your question, I think it is not possible to say categorically whether every defendant or target is cooperative or obstructionist. Some are more difficult than others.

We are fortunate in many respects—

Mr. CANADY. The gentleman's time has expired. The gentleman will have an additional 3 minutes, without objection.

Mr. SERRANO. Thank you.

Mr. PATRICK. We are fortunate that we have tremendous success in being able to settle a disproportionately high number of our matters across the board, education and otherwise, because we try to bring a problem-solver approach to the issues that come before us. Many times when you are able to get the attention of a school district or of a university system and get them to the table, then it is possible to reason through together to a solution, and I think that's why you see as many of our matters resolved consensually as there are.

Mr. SERRANO. It has been my experience that there has been progress in some parts of this country where as a youngster I was told progress would never come, and yet there might be, unfortunately, more segregation and more cases of brutality and unfairness in areas where we're told things were OK. I mean, there are boroughs in New York City that are more at war with each other, the racists, than there might be in Atlanta; at least that's the impression some New Yorkers get.

Is your Department, by examining its statistics, able to understand whether that kind of thing has taken place, where progress in some regions of the country has, in fact, taken place and in others the hidden truth has, in fact, come out?

Mr. PATRICK. I think I'm not able to tell you whether we have more problems in one area of the country than in another, or problems of one kind or another in a different part of the country than the other. We have difficult issues that come up, difficult for the country, issues that come up all over the country in terms of hate crimes in particular. The incidence of hate crimes is at an all-time high nationally, according to the most recent study from the ADL on that. That's a very serious problem and actually a problem where, back to the chairman's point, we could use some help because, if I can put a plug in, there is a provision in the Federal statute that addresses hate crimes, 18 U.S.C. § 245, that limits the reach of the Federal authority to those matters arising out of a federally-protected activity. That means that we are in a position of having to argue in some cases that the use of the sidewalk, use of the streets, where that's been a street brawl or something like that, that is racially motivated, is a federally-protected activity. We have had some success with that in some courts and not in others, but that is a jurisdictional bar that I think really makes it difficult for us to be as active in the area of hate crimes as we'd like to be.

Mr. CANADY. The gentleman's—

Mr. SERRANO. Thank you, Mr. Chairman.

Mr. CANADY. The gentleman's time has expired.

Mr. Hyde.

Mr. HYDE. Thank you, Mr. Chairman.

Good morning, Mr. Patrick.

Mr. PATRICK. Good morning, Mr. Chairman.

Mr. HYDE. I yesterday had a traumatic experience, I guess, attending the hearing for the subcommittee in the International Relations Committee where four Chinese women were brought in in handcuffs with armed guards. They didn't look dangerous to me. They looked very mild, very frightened, very weepy, and I guess their crime is they each had a child over in China.

One of them testified she picked up a baby girl that had been thrown away, and because she took that child, that it was counted against her allocation, and they forcibly sterilized her. Another woman had an abortion forced on her by the population control forces in the People's Republic of China at 6 months.

Now their crime, evidently, is they fled China because of the violation of their bodily integrity. One woman testified she's lived in a cave 7 years to get away from the authorities. Now if they aren't refugees, I can't understand the meaning of that word.

Now I know under our present interpretations, this administration doesn't count them as refugees; they're lawbreakers. They're to be sent back. That's why they were in chains, in handcuffs. I was never so embarrassed for my country—for my country—and perhaps I should be more embarrassed on more occasions, and that's a mark of my insensitivity.

But I know Jewish people for years—and still do for all I know—get in this country from the Soviet Union, the former Soviet Union, because by definition they were persecuted. When they got to New York, they were admitted as refugees, and it might well be that they should. I don't quarrel with that, but I can't understand why somebody that flees from a coercive abortion, coercive sterilization program isn't treated as a refugee and admitted to this country, or at least not held in chains or in handcuffs.

Now civil rights has a ring to it, and it's a beautiful term. And I take the word "civil" as almost interchangeable with "human," human rights. And your Division exists to see that we try to be decent to each other, treat each other as human beings, civilized human beings, but to have these people held as prisoners—oh, I understand we have to control our borders. I understand if we just let the guards down, that there would be the greatest swimming meet in history trying to get over here, and we'd be overwhelmed. I know that, but there are such things as refugees and people who risk their lives for freedom and, if they went back, would be subject to imprisonment or worse.

Two chapters in our history I'm ashamed of. In 1939 the *St. Louis* was turned back with Jewish refugees and Operation Keel Haul after World War II, where we at gun point forced Russians who had fled their own country and defected, back to death and back to the Gulag.

But, Mr. Patrick, you are a man who cares about people treating people decently, and I just don't understand why this administration, in contrast to the Bush and the Reagan—and I'm not being political; God knows they made mistakes, and we could sit here and go through them all day, but this administration, out of some heightened need to be friendly to the People's Republic of China, legitimates that coerced abortion policy to the extent where people are viewed as lawbreakers on entry and not admissible to this

country because they're fleeing from that. That's just wrong, and all I'm doing is appealing to your heightened sensitivity to human rights, to within the administration be a voice for ameliorating that policy which is, I think, terribly wrong.

Thank you.

Mr. PATRICK. Thank you, Mr. Chairman. I feel like it's an inadequate response to say that the point you raised is outside my jurisdiction, but I hear what you're saying and I—

Mr. HYDE. I don't want to put you on the spot, but I wanted you to just understand the situation. If you could have seen these women, little, little, poor little women weeping, and it's not America.

Thank you.

Mr. PATRICK. Thank you.

Mr. CANADY. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I'd be willing to yield to some of the members that were here before me, if you would like to come back to me.

Mr. CANADY. Mrs. Schroeder.

Mrs. SCHROEDER. Well, thank you, Mr. Chairman, and I thank the gentleman from Michigan for yielding.

Thank you, Mr. Patrick, for taking this job. There must be days when you think you're nuts. [Laughter.]

I think one of the other areas that is so rarely focused upon here is women and the tremendous positive effect affirmative action has had for women in this economy in being able to move in. I had breakfast with Newton Minnow today, who I think is a very distinguished person, but he was telling me one of his most difficult political appointments was to be the democratic representative for women in the military, that there was such a group on that panel, and trying to get women seen as individuals was just the most difficult thing he had ever attempted to do. Isn't basically what we're trying to do everywhere is trying to get people seen as individuals—

Mr. PATRICK. Sure.

Mrs. SCHROEDER [continuing]. And not have those barriers go up immediately because of their gender or their race or whatever?

Mr. PATRICK. That's right.

Mrs. SCHROEDER. And I guess—I mean, I look at the tools you have. After the *Adarand* case how much more difficult, or do you think it is going to be more difficult to try and continue to have each American, as their citizenship entitles them to, to be seen as an individual and judged on that basis?

Mr. PATRICK. Well, on the first, on the technical point, of course, *Adarand* doesn't reach affirmative action for women.

Mrs. SCHROEDER. That's right.

Mr. PATRICK. It talks about the standard that is applicable for race or ethnic-conscious affirmative action, and there's no avoiding the fact, there's no sugarcoating of the fact, that *Adarand* makes that more difficult for the Federal Government. It does. It's also quite clear it doesn't make it impossible, but it does make it more difficult.

Adarand I know also reaffirms the notion that the Federal Government has a compelling interest in addressing systemic racial

discrimination, ethnic discrimination, and I believe that that continues to be the consensus view of the bipartisan Congress, as it has been for many decades. We have work to do after *Adarand* and I think it's important that we not shrink from that work, and I think the President made clear that he's not prepared to take a simplistic approach and simply ban every opportunity, every mechanism that exists across the board for assuring that equality of opportunity is really available to all Americans.

Mrs. SCHROEDER. I realize that none of the cases, either *Croson* or *Adarand*, is really directed at women, and my question is, do you now expect cases on specifically how you could deal with affirmative action or set-asides for women? Do you think that—is there a round of those coming we don't know about? How is this going to impact women?

Mr. PATRICK. It's very hard to know. We have not had a flood of cases in the wake of the *Adarand* decision, in much the way that State and local governments did not have a wave of litigation after the *Croson* decision. We just have to take those as they come, and I think we do have to face the fact that now the standard of review of programs that are available to extend opportunities to women may be different than it is for programs that are designed to extend opportunities to minorities.

Mrs. SCHROEDER. I know also one of the things that my local affirmative action task force that has been looking at all these issues has uncovered is that—let me just give you the numbers that we've found for colleges: that if you look at the seventies, only about 14 percent of African-Americans were having an experience in college, whereas today it's more like 40 percent. And so their thought was some colleges appear to do much better after the young person is brought in in keeping them there than others are, and we've got some new questions.

And you find the same with companies. While you can certainly track probably similar those numbers of increasing, some companies are doing a much—

Mr. CANADY. The gentlelady's time has expired. Without objection, the gentlelady will have 3 additional minutes.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Many companies are doing a better job than others of having some kind of a career ladder. So the affirmative action part of the—obviously, this isn't the set-aside part, but the other affirmative action part of getting people in the door and trying to have some goals to do that, that part is working. The next even more difficult part—and it seems in this area each gets to be a little more difficult. The bus you can see; the lunch counter you can see; the drinking fountain you can see. Then it gets to be a little more esoteric it seems to me.

Also, what have we learned from these last 30 years and where do we go? Will that be part of what you'll be looking at as you do this review, continue to do this review for the administration?

Mr. PATRICK. Well, our job in the Justice Department is a somewhat technical one, which is to assure that there is compliance with *Adarand*, but we don't intend to abandon common sense, and the President's instructions when he ordered his staff to do the review, the report of which was released yesterday, was to consider

not just how programs are generally designed, but whether they, in fact, work. I think we need to be clear about what affirmative action is and is not. Affirmative action is not a guarantee of success.

Mrs. SCHROEDER. That's right.

Mr. PATRICK. It's not even a guarantee of opportunity. It is meant to encourage opportunity, and I can tell you as the beneficiary of affirmative action that when an opportunity is handed you, it's up to you to perform, and I think companies and schools are having to consider whether the environments in which people are asked to perform are, in fact, welcoming and sensitive, and that's appropriate. That makes good business sense and that makes good educational sense from all the business people and educators I've talked to.

You know, as I say, if we are evaluating a program that is meant to speak to that, then we have to think not just about whether that program satisfies legal criteria, but whether it makes good common sense.

Mrs. SCHROEDER. No, I'm pleased to hear you say that. I also benefited by affirmative action, and I understand what you say. That doesn't guarantee you an exit path, but we need to look at what's going on.

Let me just finally go back to the *Adarand* decision again. There have been those who have interpreted what the Justice Department said post-*Adarand* as saying it is impossible now, or almost impossible, for any Federal programs to be upheld. How do you categorize that?

Mr. CANADY. I'm sorry, the gentlelady's time has expired.

The gentleman from South—

Mr. PATRICK. Mr. Chairman, may I just answer the question?

Mr. CANADY. Well, the gentlelady has had 8 minutes, and the gentleman from South Carolina will be recognized. You may have an opportunity to answer that way.

Mrs. SCHROEDER. I'm sorry.

Mr. CANADY. I hope to have a second round, but we can't just keep going and going.

The gentleman from South Carolina.

Mr. INGLIS. You want to answer the question? Go ahead; I'll—take a minute.

Mr. PATRICK. Even less.

That is not our view and not the intent of the legal counsel's memorandum. We are determined to do the work required after *Adarand* to evaluate programs, and if *Croson* is any indication, there will be programs that survive.

Mrs. SCHROEDER. Thank you.

Mr. PATRICK. Thank you, Congressman.

Mr. INGLIS. Sure.

Mr. Patrick, it's interesting to hear you talk a little bit about the enforcement activities related to the FACE bill, freedom of access to clinic entrances, and I wonder if you are seeing any chilling effect by way of free speech activities out in the field. Are you hearing any reports of that sort of thing?

Mr. PATRICK. We are very sensitive to that because, as you can imagine, we have in our Division a heightened antenna to the first

amendment issues and the importance that they be respected. I don't know that that has come up in the context of any of the blockade cases that we've been involved in, as I sit here right now. I'm sure that, if they have, it has not survived the analysis of the courts because we have been successful in all of our cases, and we believe that would be a defense to a FACE prosecution, a FACE proceeding.

Mr. INGLIS. Would you—I guess I have been acquainted with some complaints of chilling out there in the hinterlands among people who feel that their civil rights are being infringed in the FACE context.

Mr. PATRICK. Because of the existence of the statute, Congressman?

Mr. INGLIS. And the enforcement of it; that they feel that they are—their activities, their right to free speech is infringed, and is being infringed by various enforcement actions taken, and if that—you're I guess indicating to me that you're not aware of any such complaints?

Mr. PATRICK. No, I was just going to say I wish you'd bring them to my attention because I'd certainly want to follow up on that.

Mr. INGLIS. So, in other words, you are—would you find it part of your work, then, to as well defend the free speech rights of those that feel that they are being—their rights are being infringed by the enforcement actions related to FACE?

Mr. PATRICK. Well, what I was trying to say, Congressman, is that we clearly have to pay attention to when we are evaluating a given FACE issue, whether it's on the criminal side or the civil side, whether there is a viable defense on free speech grounds and whether the bringing of that matter is likely to address or to impinge or impair the exercise of free speech. FACE speaks to conduct, as you know, not to viewpoint, and so when you're evaluating the given facts in a case, you're looking to see what the actual conduct has been, not the kind of volume or intensity of the feelings, but what was actually done. And that is the mechanism in the statute that is meant to serve as insurance against the first amendment concerns.

Mr. INGLIS. In your—

Mr. PATRICK. But—excuse me, Congressman—I'm not sure I can speak to those who may just kind of have free-floating feeling that the existence of FACE chills their free speech, but I can certainly be, and we have been, sensitive to how our own program has an impact on specific expressions of opposition to abortion.

Mr. INGLIS. Yes, of course, I guess you're speaking in terms of a defense to an action brought in enforcement of FACE.

Mr. PATRICK. I think that that would come within our jurisdiction.

Mr. INGLIS. And what action do you think you might take in the case of, if any, in the case of people who not as you say have this feeling, but rather—

Mr. CANADY. The gentleman's time has expired. The gentleman will have 3 additional minutes.

Mr. INGLIS. Thank you, Mr. Chairman.

That, basically, you're able to substantiate some pattern of infringement of their freedom of expression, and what I'm speaking

of mostly is I'm speaking on behalf of several grandmothers that I know, frankly, who are in the habit of appearing at clinics and distributing information, very heart-felt feelings, on this issue, and they report to me that they are aware in their contacts with people of enforcement aimed at those kinds of activities.

Mr. PATRICK. Federal enforcement.

Mr. INGLIS. Yes, and that's a concern that they're expressing. If that rises—in other words, if they can substantiate that—is that something that your Department would take cognizance of or is that—how would you react to that, if it's substantiated, and I have no substantiation here.

Mr. PATRICK. I'd like to know more about it. Obviously, if there is a Federal enforcement activity that we've initiated—frankly, if anybody else has initiated—that is impairing those citizens' ability to hand out leaflets, then we have a problem and we have to address that problem. Maybe we could follow up and get more—

Mr. INGLIS. Sure.

Mr. PATRICK [continuing]. Information on that. As I sit here, I'm not aware of any such problem.

Excuse me one second, Congressman.

I apologize for not having the details at my fingertips, but I believe that we did file one FACE case so far among the dozen or so that we've filed that was a threat by a provider against a protest that seemed to follow strictures of FACE, but, as I sit here right now, I'm sorry, I just can't remember the details. We can follow up, and if the chairman would like, we can follow up with information for the record.

Mr. INGLIS. Yes, I would very much appreciate that, and I thank you and yield back the balance of my time, Mr. Chairman.

Mr. CANADY. Thank you.

Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman.

I'm delighted to see Mr. Deval Patrick with us, as usual doing an excellent job. I join the members of the committee who have observed that in the short time that you've been at your very difficult task you've tried to reach out and bring a new dimension to your role, and that is to educate people about the true nature of the move to make America what it has always claimed that it was and what it, for the most part, wants to be.

I'm thinking now about the other parts of your job that don't include affirmative action. Am I right in thinking that there is this other vast series of responsibilities that, as important as affirmative action is to all of us, there are a lot of other things going on, and because I didn't have the opportunity to hear you, could you merely put the affirmative action responsibility in some context with the rest of your responsibilities and duties?

Mr. PATRICK. I can try. Affirmative action issues seem to be out of context in the society generally. So I'm not sure I can put it in appropriate context in our program, but it is a very small part of our program. We have, if I'm remembering it correctly, two or three cases now that are about affirmative action, about whether a given affirmative action plan is lawful. We have on both sides of that question—in some cases we've viewed a given plan as lawful and in others we've viewed it as unlawful under existing law. The vast

majority of our program is about discrimination. It is about the underlying problems of exclusion from housing and lending opportunities, about the underlying exclusion from employment opportunities and promotion opportunities, about the underlying problem of exclusion of persons with disabilities from the whole range of civic activities, educational quality, and access to educationally equal opportunities, voting rights from the esoteric, the whole business of redistricting congressional districts, and so forth, to the basic intimidation and harassment which we see several cases of every year. It is a rich and full program, and I believe in my soul that there will come a time when the Civil Rights Division will become, in fact, obsolete. I really do believe that there will come a day when the work that we are charged with is not as demanding as it is right now, but we are definitely not there yet. If anything, we see through what we do every day the truth of that wonderful adage of Jefferson's that constant vigilance is the price of liberty.

Mr. CONYERS. Thank you so much.

I'm doing some reading about American history. I was looking at Howard in the other day, who had been writing about our—one of his books was on American political history and another was on the justice system in America and how that has evolved. And one of the difficult responsibilities that we have as we move forward in this country is understanding that progress doesn't always run on a straight line and a continuum. Things do not get constantly better. Understanding does not increase its momentum and aggregate in larger and larger percentages of understanding. I think that there might be, were there a graph—may I have 3 additional minutes, Mr. Chairman? Thank you.

Mr. CANADY. Yes, the gentleman will have 3 additional minutes, without objection.

Mr. CONYERS. But if there's a graph, it would show that we move forward in some areas and slip backward in others, and make breakthroughs in others and are grievously disappointed in still others. And I was just wondering what you think of that kind of pattern of progress that history shows us to be making in terms of our understanding about race and gender and religious views in American society.

Mr. PATRICK. It's a nice, small, narrow question. [Laughter.]

I think that the genius of the Founders was not in what they created so much as what they dedicated this country to becoming. What is unique about this country and, in my view, what is inspiring about this country is that we don't put our ideals on a shelf. We bring our ideals into regular daily life, civic life, and on its best occasions into the Halls of Congress and the White House and the courts, and we struggle with how to bring our reality as close to our ideals as possible.

I think that when there are upswings on that graph you were talking about, that denotes times when we have paid attention in practical ways to how to close the gap between our reality and our ideals. When there are downturns, that is when we're a little less vigilant and a little less mindful and maybe a little less caring and respectful of our ideals. But I think we are at a time in this country where it makes sense for all of us to pay very close attention to those ideals and to the gap between our reality and our ideals.

And I can tell you that from what I gather in the travels I do, in talking to regular people, regular old citizens, that I think that the reservoir of good will is still deep in this country and just has to be called forth.

Mr. CONYERS. Very well said.

Mr. Patrick, I'd like to just raise these three items with you, and I know if the chairman would allow you to respond to them, you will.

Mr. CANADY. I'm sorry, the gentleman's time has expired. We're hoping to have a second round. Perhaps you'll have an opportunity then.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much.

Mr. Patrick, as you may know, I was given credit by civil rights organizations for the passage of the Voting Rights Extension in 1982. So my questions do not come from a position of hostility toward that law. But, as you know, I wrote you a couple of times following the November election relative to an incident in Orange County, CA, relative to the proposition 187 campaign that was conducted in that State, specifically expressing my concern about your Division sending the FBI to grill one Barbara Coe 3 days before the election about her organization's plans to put up signs outside polling places that said, "Noncitizens cannot vote; violators would be prosecuted" was a violation of the Voting Rights Act in that it was alleged that this was intimidating the voters. How did you reach the conclusion that merely stating what the law is on a poster is intimidation of voters?

Mr. PATRICK. I think this goes back to an exchange of correspondence we had in December of last year.

Mr. SENSENBRENNER. Correct.

Mr. PATRICK. Right. And what I said to you in the letter, and for the record, is that we learned, the Voting Section learned that Mrs. Coe had made public statements indicating plans to conduct voter intimidation at the Hispanic polling places. In 1988—

Mr. SENSENBRENNER. That doesn't answer my question now, Mr. Patrick. I know what you wrote me and that was an unsatisfactory answer. My question is, how is stating what the law states intimidation of voters when you put up a sign that says noncitizens cannot vote?

Mr. PATRICK. It's a violation of an order by a court in a private lawsuit, it happened, that was resolved in 1988 against the county Republican Party. That is what caused us to be concerned about—

Mr. SENSENBRENNER. But Mrs. Coe is not an official of the Orange County Republican Party. The FBI grilled her about her political affiliations and contacts with people in the Orange County Republican Party, and the FBI was told that her activities were as a part of a citizens' organization that was campaigning in support of proposition 187.

Mr. PATRICK. And the FBI backed off.

Mr. SENSENBRENNER. OK.

Mr. PATRICK. Right.

Mr. SENSENBRENNER. But—

Mr. PATRICK. We didn't have that information when we first got the complaint.

Mr. SENSENBRENNER. The complaint came from a Hispanic group and an official of the Orange County Democratic Party, and it seems to me that not only should the implementation of civil rights be colorblind, but they also should be politics-blind. Do you think you kind of got sucked in by those folks?

Mr. PATRICK. Well, I know the career folks in the Voting Section who made the judgment based on the complaint we got to ask the FBI to go out and ask some questions. I don't have the impression, by the way, it was the grilling that you've described it as, but—

Mr. SENSENBRENNER. Well, that was what was in the Washington Times of January—or, excuse me, February 2.

Mr. PATRICK. I'm not sure that makes it so, but—[laughter]—

Mr. SENSENBRENNER. OK, well, let me ask you a question. There were people who appeared on television before the vote in California on proposition 187 who threatened riots if the voters should approve proposition 187. Isn't that intimidating and shouldn't you look into those kinds of threats, too?

Mr. PATRICK. My understanding is that that is not intimidation within the meaning of the Voting Rights Act, but the Community Relations Service, which is, as you know, responsible for community unrest that has a civil rights—

Mr. SENSENBRENNER. But that's a conciliation organization. You are a prosecutorial organization. And isn't threatening the destruction of property and placing life in jeopardy through riot intimidation, more intimidating than putting up a sign that says, "Noncitizens can't vote; violators will be prosecuted?"

Mr. PATRICK. Well, I'm not going to get into whether one matter is more or less violative of the law. I will tell you—

Mr. SENSENBRENNER. But, Mr. Patrick, you did do that by sending the FBI out to grill Mrs. Coe when her offense seemed to be putting a sign up that merely stated the law that is in effect in California, and I would assume every other State, that—

Mr. PATRICK. Congressman, if I could—

Mr. SENSENBRENNER [continuing]. A noncitizen voting is an act of election fraud.

Mr. PATRICK. Congressman, may I answer your question?

Mr. SENSENBRENNER. Surely.

Mr. PATRICK. Mr. Chairman, may I answer—

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. PATRICK. My staff sent the FBI out to follow up on questions, and questioned Mrs. Coe because the information that we had at the time indicated that there may be violation of a specific Federal order. The FBI went out with specific questions to ask. My understanding is that they asked those questions. They conveyed that information back to the Voting Section, and on the strength of those answers the Voting Section took no further action. That was our responsibility. That much I know.

Now as I sit here today, I can't tell you that there should have been some other response to the generalized charges that you've said happened, and I'll take your word for it. I don't know anything about it other than the response of the Community Relations Service to assure that there would not be community unrest.

Mr. SENSENBRENNER. Well, Mr. Patrick, you were kind enough to send an attachment of the questions that you asked the FBI to ask. None of those questions—and I give you credit for this—had anything to do with any allegations of affiliation between Mrs. Coe and the Orange County Republican Party. The FBI went and asked her questions about her affiliation with the Orange County Republican Party. It seems to me that when you're active in politics and you get a visit from the FBI 3 days before an election, that's coercive, and it was selective, too, because there were people who were threatening riots. Burning down my house and threatening my life, if I am participating in politics, I think is just as coercive, and perhaps even more so, than sticking up a sign, whether or not it was approved by a court, that says, "Noncitizens can't vote; violators will be prosecuted."

I point out that in my State, State law requires a card that says, "Notice of election fraud" be posted in every polling place in the State of Wisconsin, and right on the top of it it says that if you do not meet the qualifications to vote in Wisconsin, you are guilty of a felony and subject to a fine and a certain amount of imprisonment. That's put up inside the polling place by direction of the legislature of the State of Wisconsin in terms of passing the election law.

Mr. PATRICK. As distinct from a private citizen, yes, I understand. Yes, I understand your opinion, Congressman, and I accept that opinion.

We looked into the matter after we got the letter, and we satisfied ourselves that there had not been the selectivity that you alleged.

Mr. SENSENBRENNER. Do you think you ought to apologize to Mrs. Coe?

Mr. PATRICK. That I ought to apologize to Mrs. Coe? No, I don't.

Mr. SENSENBRENNER. Yet, you sent the FBI out to talk to her.

Mr. PATRICK. And, as I told you a moment ago, based on your having brought this to my attention, we concluded that nothing wrong was done.

Mr. SENSENBRENNER. Yes, but if I hadn't done it, then maybe the conclusion wouldn't have been reached.

Thank you, Mr. Chairman.

Mr. CANADY. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Patrick, welcome.

Mr. PATRICK. Thank you, Congressman.

Mr. GOODLATTE. We are glad to have you here and—

Mr. PATRICK. It's good to be here.

Mr. GOODLATTE. I want to say that, following up on what the gentlelady from Colorado said, and perhaps a differing viewpoint, I think that, given the fact that it is very true that we still have instances of discrimination in this country, as you described at the outset of your remarks that you have a great job. You have a job that lets you get up every morning and go and attempt to correct those, combat those, to work to improve the situation.

I think also that we have made tremendous progress over the years. I think that your generation and my generation have a different attitude about some things that perhaps our parents' genera-

tion didn't have. I think that generation helped to lay the groundwork for much of the efforts to make sure that there is not discrimination based upon race or gender or national origin or religion, and so on. And I'm hopeful that our children will continue to see that improvement. I think they will. I think the standard that we hope to see us all measured by was set out by Reverend King, that we all be judged by the content of our character rather than by the color of our skin or our gender, or if I can paraphrase, any of these other factors that have caused discrimination in the past, continue to cause discrimination amongst some people and at some places today, will continue to be rooted out.

What I'd like to talk to you about is these recent Supreme Court decisions and the policies of the administration and your Department and, in fact, some of the laws that are in place right now that I do not agree with. I do agree with affirmative action if affirmative action means that each one of us is obligated to make sure that when we consider people for hiring, when we consider people for educational opportunities, when we consider people for government contracts and all of the other manner of areas that we talk about in this area, that we are making sure that we're going beyond the scope of our own contacts, our own circle of friends, our own community of interest that you might find, and making sure that we are reaching out and making sure that everybody has the opportunity to participate and apply for these programs.

But where I differ is in the area of coming down to making the final decision, and we found, when we asked the Congressional Research Service, we found 177 Federal statutes, regulations, and Executive orders that create preferences of various types, that say in the end we are going to permit making a decision based upon race or gender or other classification when it comes down to two people. And the problem I have with that is this: that while there has been a history of discrimination in this country by classes of people against other classes of people, and while there are certainly de facto instances of that discrimination that go on today, there is no measure in those programs and those procedures that create preferences to say that the person that stands before you when they apply for the job or when they apply for admission to school, when they apply for the contract, that that person has in any way participated in any of that discriminatory behavior that is trying to be corrected.

And so what we're talking about here to me is a principle, and it's a principle that I don't think the President addressed yesterday, and it concerns me. And that is that when two people stand before someone who makes a judgment, they should not be judged by the color of their skin or by their gender or by any of these other factors, and that is what I think the Supreme Court cases are directed toward. I don't think they answer these questions completely at all.

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. GOODLATTE. I do want to get to a question before those 3 minutes are over, but I do want—

Mr. PATRICK. And you do want the answer.

Mr. GOODLATTE. I do want you to address that issue when it comes down to making the decision between two individuals, why

should—when we have no evidence of any discriminatory behavior by that individual in the past, why should preferences be recognized under those circumstances for anybody based upon race, gender, national origin, religion, et cetera?

Mr. PATRICK. Congressman, with due respect, I'm not sure that's the question, although I know what you're getting at. I think that when, if we're talking, for example, about the employment context, in that rare case where it comes down to two people—

Mr. GOODLATTE. It always comes down to two people.

Mr. PATRICK. It never comes down to—

Mr. GOODLATTE. Now in the end—in the end you've got, if you want to talk about a contract, you've got the low bidder and you've got the low minority bidder, if it's a minority contractor. In the end it always comes down to a choice between two people. Why under those circumstances should a preference be granted based upon race, if we are trying to apply the principle that this country should be colorblind, a principle I believe very strongly in?

Mr. PATRICK. I think that when you're hiring, if it really does come down to two people, as you say, you should pick the best person, period. I think that the best, however, is in many, many circumstances going to involve a variety of factors that you can't always put your finger on. One of the best things that has come of affirmative action is that it has focused employers really on merit rather than—when it works as it's supposed to.

Mr. GOODLATTE. I think that—I think that is good. I don't dispute that, and, as I say, we do have the need to broaden our focus to make sure we are including everybody when we bring people in to the pool to consider.

Mr. PATRICK. If I can just take it a step further, I think it is possible, all other factors being equal, and there are bunches and bunches of factors, that a judgment in that circumstance would be problematic after *Adarand*. But I think when an employer, for example, is making a judgment between those two people, the employer naturally is thinking about what his or her needs are, thinking about what the combination of qualities and contributions and talents that each of us represent the agglomeration of. It rarely is going to come down to nits on a scorecard or something like that. There are judgments that have to be made, and employers ought to have the latitude to make those judgments with common sense. I don't think affirmative action, when it works right—

Mr. CANADY. I'm sorry, the gentleman's time has expired.

Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman, and thank you, Mr. Patrick, for being with us today. I understand you wowed them in Cleveland just a few weeks ago.

Mr. PATRICK. I don't know about that.

Mr. HOKE. That's what I was told by people who wouldn't have necessarily been your friends, but apparently it was a very impressive performance, and I'm glad you did well there.

I grew up in northeastern Ohio and I represent the west side of Cleveland, and every time I go back home I'm reminded of the extraordinarily negative impact that forced busing has had on the city of Cleveland. I want to focus for a moment on this issue since

you're here and we have the time, and ask what you perceive to be the Department's role in these cases.

The most current list I've been able to obtain indicate that there are some 259 school districts operating under court-ordered busing where the Department of Justice was either a party in the case or is actively monitoring compliance with the order. Another list, which was drawn up in 1994 by the Department of Education, includes 900 districts that reached a negotiated settlement with the Government, a settlement that still includes the forced transportation of students based on race. Presumably there is some oversight by the DOJ as well.

There's a third category of cases where the Government has not been involved. These are brought by private organizations, individuals, or State governments. No one seems to have compiled a list of these cases, but, presumably, there are a number of them.

In other words, we're looking at a minimum of 1,159 school districts that are still operating under court-ordered busing, and I don't know where the numbers go from there. Those who suggest that busing doesn't exist anymore or is no longer a program are dead wrong. In Cleveland alone 17,000 kids are bused every day because of the color of their skin. The Cleveland school district has repeatedly asked the court to release it from the busing component of its 21-year-old desegregation order.

The district won what was considered to be a small victory in January of this year when the judge overseeing the case ruled that it did not have to bus an additional 400 students, but we're still talking about 17,000 that are being bused. It's imperative that the district get out from under this order because the city of Cleveland is experiencing social decay as a result of it, and don't doubt for a moment that busing destroys a neighborhood's sense of cohesiveness and sense of community. Almost everyone in Cleveland agrees that busing must end. George Forbes, former president of Cleveland City Council and the current president of the Cleveland NAACP opposes continued busing, as does the former president of the NAACP, Rev. Marvin McMickle, and a long-time chapter member and prominent Clevelander, Stanley Toliver.

In an interview with the Cleveland Plain Dealer, McMickle stated that busing has long ceased to accomplish anything useful. The Urban League of Greater Cleveland has also expressed its opposition to busing. In fact, in the words of the league's president, Myron Robinson, "Busing is a charade." He also noted that there are not even enough white students in Cleveland to meet the numerical quotas of the busing order.

Let me also give you some statistics. In 1978, when busing began, Cleveland schools were 60 percent black. Today they are 70 percent black. The city's population has declined from about 565,000 in 1978 to about 475,000 today. School enrollment has declined from 132,000 in 1978 to 74,000 today. Average SAT scores have declined. Graduation rates have not improved. The last time a school operating levy was passed in Cleveland was 1983. Since then three school levies have been turned down. In the 1993-94 school year, the board spent \$84 million to enforce its desegregation order and to pay for mandatory busing. Cleveland has spent nearly \$1 billion on this order. The Cleveland school system is now

bankrupt. It is in receivership. It is being run by the State of Ohio, which will itself spend an additional \$10 million on the desegregation order.

To quote George Forbes, who I know personally, and who is president of the Cleveland NAACP, "being honest means saying that busing no longer serves any useful purpose toward the education and welfare of children in Cleveland today. It must end."

Mr. CANADY. The gentleman will have 3 additional minutes, without objection.

Mr. HOKE. Thank you.

Given all of these facts, (a) Do you think that busing has worked in Cleveland? (b) Do you think that there's any justification to continue this? (c) What is the Justice Department's position on race-based busing? and (d) Most importantly—and I don't want to overwhelm you with all these questions at once, but the one that I'm really most interested in is—Is the Justice Department willing to undertake an analysis of all Federal desegregation cases still on the books and make recommendations on their status?

Mr. PATRICK. This is Judge Krupansky's case?

Mr. HOKE. Yes.

Mr. PATRICK. Yes, we're not in that case, you know. So let the record be clear; this is not a U.S. Justice Department case.

And I'm going to, with due respect, Congressman, not wade in. They don't need another lawyer in that case offering opinions about how that case has unfolded or whether the remedial order is vital today.

I think that everybody—

Mr. HOKE. Well, not to be argumentative, but I would respectfully disagree. I mean, I'm an attorney; you're an attorney. Clearly they do need the voice of attorneys at your level and at my level saying what we believe needs to be done there.

Mr. PATRICK. Well, let me try to describe for you what we're trying to do and what our approach is with respect to busing generally with this caveat, and this is just as a relative newcomer to Washington. I guess what I notice in this town, that everybody seems to have views on everything, including things that they don't study in all cases. And I think I've got to be careful that my views are well tutored, and I am not engrossed in the details of that case or the justifications that the court has found in extending the order. I assume in the 21 years you talked about that it's been reviewed from time to time. I think Judge Krupansky is new to the case, I think—

Mr. HOKE. He's new to the case. Judge Battisti passed away about a year and a half ago, in January 1994.

Mr. PATRICK. Right, right.

My own view of busing is not categorical. Busing has not worked in some places. It has not worked. We've got to face that. It has worked in other places. It tends to work as a desegregative tool in communities where the kids are bused anyway. So I think Charlottesville, NC, is an example. Maybe Congressman Watt, who is here, can speak to that.

Mr. WATT. Charlotte, not Charlottesville.

Mr. PATRICK. Excuse me, Charlotte.

Can I go a moment more, Mr. Chairman?

Mr. CANADY. Well, if there's no objection, I will—yes.

Mr. PATRICK. I know you don't want to set a precedent.

Mr. CANADY. I don't want to set a bad precedent—

Mr. PATRICK. Neither do I.

Mr. CANADY [continuing]. But we're about to—well, I'll tell you, let me recognize—the problem we face here is that we're about to have a vote, and I'd like to give Mr. Watt an opportunity to—

Mr. PATRICK. Can I follow up with you, Congressman Hoke?

Mr. HOKE. Yes.

Mr. CANADY. And, again, we're hoping to have a second round. So let me not set that precedent.

Mr. PATRICK. Well, your point is well taken.

Mr. CANADY. Mr. Watt.

Mr. WATT. I'm happy to give the gentleman a chance to respond to Mr. Hoke's question. To proceed on my time is fine.

Mr. PATRICK. Thank you.

I was just going to say that our view is that busing is a tool we can use that does not and should not be used in every case, that we've got to make a judgment, and a commonsense judgment, in the context of the given circumstances, whether it's going to work. Now I don't think we should run away from busing just because there are objections to it in some categorical, philosophical way without evaluating whether it does or does not make sense in a particular community.

And one of the things you have to consider in considering whether it's going to work is whether it's going to be embraced and supported by the community. So you can't run away from opinion, but you can't let public opinion determine what is or is not a practical solution to a problem.

We monitor about 300 existing court orders now that the Department of Justice has. The OCR in Education you referred to has its own docket, and those are matters that have not been referred to the Department of Justice. They handle that. And we occasionally get issues—they sometimes come up in the unitary status motions. Do you know what I'm talking about, in the context of the unitary status motion? My instructions to our staff is that we take a practical, commonsense approach, that we not insist that there be busing or that busing continue in every case. We just have to try to determine whether it is a tool that can work and will work in service of the common interest in assuring that the public schools are operating in a constitutional fashion.

Mr. HOKE. Well, I appreciate those comments, and thank you for yielding. And I'd like to pursue this because I think there's been a great deal of destruction done to all parties—

Mr. WATT. Mr. Hoke thinks I yielded to him?

Mr. HOKE. No, I do not think that, Mr. Watt, no. [Laughter.]

Mr. WATT. I knew it. I thought—I knew you knew better. No, I'd be happy to yield to you if you want to pursue that further.

I don't have any questions, Mr. Chairman. I would just want to say that this last response probably illustrates what I think has been just a wonderful balance that the Justice Department has shown in the Civil Rights Division under Mr. Patrick and commend him for the job that he's done coming into a situation that was difficult when you first came in; we tend to forget these things when

people do outstanding jobs, as he has, the difficulty of the circumstances into which they were injected, and I want to commend him publicly for the great job that he has done in a number of areas. Now I won't mention any of those areas for fear that I will provoke questions that need not come up. [Laughter.]

Mr. PATRICK. Thank you.

Mr. WATT. I was one of those people that thought he looked too young to take on this position. So I——

Mr. PATRICK. I'm looking older every day.

Mr. WATT [continuing]. Was very timid when he came in, but taking a retrospective look at it, he has done an outstanding job, and I want to commend him publicly, and you are looking a little bit older after a year. [Laughter.]

Mr. PATRICK. Thank you, Congressman.

Mr. WATT. I yield back the balance of my time.

Mr. PATRICK. Thank you.

Mr. CANADY. Thank you.

I would like to do a second round of questions. So I'd like to follow up on some things that I didn't have an opportunity to ask about in the first round.

I was a participant in a forum recently on the subject of affirmative action in racial and gender preferences, and a statement was made there that the goal of a colorblind society is not a legitimate goal. What's your reaction to that statement?

Mr. PATRICK. Sure, it's a legitimate goal.

Mr. CANADY. So you disagree with that, the statement that the goal of a colorblind society is not a legitimate goal?

Mr. PATRICK. Is not a legitimate goal?

Mr. CANADY. Right.

Mr. PATRICK. I mean, I guess you could quibble about whether it's a realistic goal, but I think——

Mr. CANADY. But you believe that should be our goal?

Mr. PATRICK. I think it is our goal.

Mr. CANADY. OK. Well, I agree with you that that should be our goal.

Let me ask you, going back to the President's statement, the President said that affirmative action should not go on forever. Why is it that affirmative action should not go on forever? What did the President mean by that?

Mr. PATRICK. Well, I'm sure what he was addressing is, frankly, one of the kinds of considerations that the courts have looked to in determining whether a given program was narrowly tailored. That is, we have to remember——

Mr. CANADY. Well, I understand that test about time limitations.

Mr. PATRICK. Mr. Chairman, can I——

Mr. CANADY. Well, no, let me make clear my question. But the President said affirmative action should not go on forever. Leaving aside what the courts require, why is it that it should not go on forever?

Mr. PATRICK. That's what I was trying to say. I think the President recognizes, as the courts have, that the goal, as I said in the opening, is not affirmative action; the goal is equal opportunity. Affirmative action is one tool, and when we have achieved the goal of an affirmative action plan in a particular context, then it needs

to be reviewed so that you can make a determination whether it is time to move on.

Mr. CANADY. Well, what length of time would you ordinarily be looking at? Now I know that's going to be context-dependent, but as you look at—

Mr. PATRICK. That's the answer.

Mr. CANADY. What? But as you look at any of the programs that we currently have in place, do you believe that any of them have gone beyond the time that they should have stayed in place?

Mr. PATRICK. Well, Mr. Chairman, I told you at the outset that that is obviously one of the things we have to pay attention to through the Associate Attorney General's Office and his legal evaluation, and I'm not going to get ahead of that. I can tell you that if that determination is made among others in the course of that evaluation, we're going to have to take action. That's our constitutional responsibility and that's what we have to do consonant with the President's policy.

Mr. CANADY. But you don't know of any program right now that has gone on too long?

Mr. PATRICK. Mr. Chairman, I really actually don't spend my time thinking about the nuances of specific affirmative action programs in the Federal Government.

Mr. CANADY. Well, you'll probably spend a little more time on that in the coming days.

Let me touch on another subject. The President stated that he's opposed to quotas. Now there's disagreement about what actually constitutes a quota. I looked up the word in the dictionary; I thought I'd do that. The American Heritage Dictionary says a quota is a proportional share assigned to a group or to each member of a group, an allotment. Another dictionary says a share or proportional part of a total that is required from or is due or belongs to a particular district, State, person, group, et cetera.

Do you agree—that's the definition of quota; would you agree?

Mr. PATRICK. I guess I'd agree that that's the definition you read in the—

Mr. CANADY. Well, do you think those definitions are incorrect?

Mr. PATRICK. I think the court speaks to what matters in this area, and what matters in this area is that if numbers are used, they have to respond to some demonstrable pool of qualified candidates and they cannot be so inflexible that it cordons off from the pool of talent—

Mr. CANADY. OK, let me ask you in connection with this—

Mr. PATRICK. Mr. Chairman, may I just finish—

Mr. CANADY. Well, no, I'm asking the questions, and I appreciate your answers, but—

Mr. PATRICK. I'm just trying to finish my answer—

Mr. WATT. Mr. Chairman. Mr. Chairman, would you yield just—

Mr. CANADY. I'll yield to Mr. Watt.

Mr. WATT. It does seem to me that you're asking a bunch of questions that you're not giving the witness an opportunity to respond—

Mr. CANADY. Well, I'll reclaim my time. I'll reclaim my time.

I have a very limited amount of time here, and I would like for you to try to focus on the specific question that I'm asking. Let me ask you this: do you think there's a difference between a quota and a set-aside?

Without—

Mr. WATT. Regular order.

Mr. CANADY. You object?

Mr. WATT. No, I don't object, Mr. Chairman.

Mr. CANADY. OK, without objection, we'll have 3 additional minutes.

Mr. PATRICK. From a legal point of view, yes, I think there is.

Mr. CANADY. OK, would you tell me why a set-aside which establishes a percentage allotment for a particular group is not a quota?

Mr. PATRICK. Well, I think that the judgment about whether a given numerical use is a quota is going to depend on the kinds of the factors that the court has laid out when it's talked about narrow tailoring. If the number in any context is so inflexible that it doesn't permit the availability of opportunities to everyone, then a judgment has to be made about how that works in the balance against the compelling interests that the Government is trying to address. That's what *Adarand* talks about.

Mr. CANADY. But, OK, well, I understand what you're saying there, but why is it that a 10-percent set-aside—and that number is frequently used—a 10-percent set-aside is not a quota?

Mr. PATRICK. If a 10-percent set-aside is in theory or in practice an exclusive reservation of opportunities to particular individuals or types of individuals, then that is problematic; that has to be faced. But what we saw in the—may I continue my answer?

Mr. CANADY. Sure.

Mr. PATRICK. What we saw in the—

Mr. CANADY. I was clearing my throat.

Mr. PATRICK. I'm sorry.

Mr. CANADY. I'm sorry, I was coughing.

Mr. PATRICK. What we saw in the President's review is that very, very few programs actually operate that way. To the extent that they do, then they're going to be programs that we have to deal with in the course of the Associate Attorney General's review.

Mr. CANADY. Let me touch on an issue related to the case that we've discussed here on Capitol Hill, and it's been in the news quite a bit. That's the *Piscataway* case. Is the Department going to reevaluate its position in the *Piscataway* case in light of the *Adarand* decision?

Mr. PATRICK. No.

Mr. CANADY. OK. Now the Office of Legal Counsel in a memorandum that they have produced with respect to *Adarand* has said that it is clear that, "to the extent affirmative action is used to foster racial and ethnic diversity, the government must seek some further objective beyond the mere achievement of diversity itself."

Do you think that that statement is consistent with the Government's position in the *Piscataway* case?

Mr. PATRICK. Sure. The *Adarand* case, as you know, addresses the constitutional limits of Federal affirmative action programs. The *Piscataway* case is about what an employer may do under title VII, and we took the position, as I think you know, in that case

that, based on the case law, there was nothing that—is it all right to finish my answer?

Mr. CANADY. I'm sorry, I will apply the same rule to myself that I have applied to others.

Mr.—who is next here? Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Patrick, I do want to give you the opportunity to say anything further. You were addressing my question about preferences and quotas.

Mr. PATRICK. I think I'm done, Congressman, if you want to follow up—

Mr. GOODLATTE. OK, let me follow up a little bit about what the chairman was talking about in the *Piscataway* case. If you take the position that it's appropriate in order to achieve a certain diversity on a faculty to allow a teacher to be terminated because they are not a member of the black race in order to retain somebody on the faculty who is black, why wouldn't it be also OK in different circumstances, in order to achieve that same diversity, to fire a black teacher so that a white teacher could remain?

Mr. PATRICK. Well, I think actually we made reference to that very fact in a footnote in the brief we filed in *Piscataway*. If I could—

Mr. GOODLATTE. Where does that end, though? I mean—

Mr. PATRICK. Congressman, may I just—

Mr. GOODLATTE. I guess we come back to the same question about what the President said yesterday. When does this end? When do we stop making these decisions on the basis of race?

Mr. PATRICK. Well, I'm not sure that, first of all, that we're talking about a case that really speaks to that example, but if the Congressman would permit me, I'd just like to—

Mr. GOODLATTE. Absolutely. Go ahead.

Mr. PATRICK [continuing]. Lay out our view of the *Piscataway* case. That's a hard case. That is a hard case. Nobody is pretending that it isn't. That was a case where the school board had to lay off someone, one person, because of declining enrollment. It had two individuals who had absolutely equal seniority, and started on the very same day. They have a plan that says that the most junior person is the first to let go. They looked to the most junior in that department and they saw that there were two people with identical seniority. So they then moved on to performance because they were looking at teachers who had been on the faculty at the same time. And the school board evaluated their performance over that period of time, annual performance appraisals, and concluded that they had performed equally well. Indeed, the two teachers stipulated to that for purposes of the record.

So the school board moved on to their qualifications, their teaching certificates, and concluded that the two teachers had the identical relevant qualifications for the job, for the courses that would remain to be taught. They, then, had to make a judgment, and their judgment was not as a legal matter, about whether one person was entitled to the job or the other not; it was a judgment about whether they were going to resort to a coin toss or whether they were going to pay attention to what they viewed as their institutional needs.

They invoked an affirmative action plan they rarely use in circumstances where they had a student population about half of which was minority and a business department, that group within which they were making that decision, that was entirely white in the absence of the one minority teacher. And they decided, because of those circumstances, to retain the black teacher and to let the white teacher go. And, fortunately, she was rehired within the school year.

We did not take the position that that was the best policy choice that the school board, the local school board, could make or should make in those circumstances. Our job was to determine whether that local decision violated Federal law. In the previous administration they concluded that it did. When the matter came to us before—in time for appeal, and we looked at the law, we could see no clear precedent that suggested that it did, and so we thought this is a case where the Feds have made a Federal case out of something which is not a violation of Federal law. So we withdrew from the case—

Mr. GOODLATTE. Well, let me ask you about that, that point, because it seems to me that we're talking about Federal constitutional rights and—

Mr. PATRICK. No, no.

Mr. GOODLATTE [continuing]. Federal civil rights—

Mr. PATRICK. No, we're talking about Federal statutory rights.

Mr. GOODLATTE. Right, but let's be clear that those statutory rights stem from our interpretation of what constitutional rights should be available to all people. If you're going to make that conclusion, and if you're going to enforce it as you do—and I have for four different—if I may have 3—

Mr. CANADY. Yes, the gentleman will have 3 additional minutes.

Mr. GOODLATTE [continuing]. For four different administrations received the press releases of the Civil Rights Division, and I follow all the different types of cases that you file. I don't see how you can draw a difference between that case. All of them involve some form of a local decision being made, either by a public entity or a private individual or entity making the decision, and I don't see how you can make that distinction in this case.

Mr. PATRICK. Well, the judgment that we make is not whether there is or is not a local decision involved.

Mr. GOODLATTE. They're always—it's almost always a local—

Mr. PATRICK. Sure, sure. The question is whether the local decision violates Federal law, and the judgment we made is that it didn't violate Federal law. There is no case that anyone can point to that clearly says they did violate Federal law—title VII, the statute at issue in that case. And so it seemed to me to be inappropriate for us to have expended resources and to have made a Federal case out of something that was not a clear violation of Federal law. So we got out of the case and we filed the amicus brief we did explaining why.

It's a tough case; there's no denying that.

Mr. GOODLATTE. Well, I concede that it is a case that goes right to the line, but the question is which side of the line you come down on. Are we going to have decisions based upon content of your character or the color of your skin? Obviously, there you've got

to go another step further; you've got to find some other criteria, if you're going to not judge based on the color of your skin.

Mr. PATRICK. Well, if I can respond to that generally, Congressman, I think when the courts say that race can be a fact among others, a lawyer has to allow for the possibility that on occasion—and I think how often does this really happen in real life when people—

Mr. GOODLATTE. Well, in terms of the number of levels of comparison that they concluded that comparisons were equal, yes, I agree with you this would be a rare case.

Mr. PATRICK. I don't mean to—I don't mean to—

Mr. GOODLATTE. And I agree with your assessment that, for that reason, it is a difficult—

Mr. PATRICK. And I really don't mean to diminish—

Mr. GOODLATTE. It still comes down to the line; there's still—

Mr. PATRICK. I clearly understand—

Mr. GOODLATTE [continuing]. There's still the knife edge that you're on; which side do you fall down on?

Mr. PATRICK. Right. Right. We're not quarreling and I don't mean to—I just wanted to hasten to add I don't mean to diminish the significance of this case for the teachers who were involved by any means. I just mean that, if, as the courts have said, race can be a factor, then you can imagine a rare situation like this one where all the other factors are going to wash out because they balance themselves out. I think if there had been any one of those factors that was not in balance, the case would have gone a different way. If there had been—if the seniority—

Mr. GOODLATTE. What about simply a random choice when you have all the other factors washing out?

Mr. WATT. Can he answer that question?

Mr. CANADY. In consistency here, I'll have to recognize the gentleman from North Carolina.

Mr. WATT. I'm happy to have the gentleman answer that question in continuing his response to Mr. Goodlatte.

Mr. PATRICK. I thank you, Congressman. Is that all right, Mr. Chairman?

Mr. CANADY. Oh, absolutely.

Mr. PATRICK. I think—

Mr. CANADY. That's been our practice.

Mr. PATRICK. I see. I think that the issue in this case, the legal question in this case, reduces to whether the teacher who challenged the practice was entitled as a matter of Federal law to a coin toss. That's what it comes down to, and there is no case that says that that teacher was entitled to a coin toss. Now you or I might have made a different policy judgment or cast a different kind of vote, if we sat on that school board. You or I don't sit on that school board. We don't know what the issues are that that school board is trying to absorb or to respond to in making their employment decisions. But, as I say, there is absolutely no escaping the fact that this is a difficult case. I believe from a law enforcement point of view we made the conclusion we did about whether there had or had not been a violation of Federal law, and it seemed to us at the time to get out because it was—

Mr. WATT. Mr. Conyers has requested that I yield to him on that point, and I'm happy to do that.

Mr. CONYERS. Thank you, Mr. Watt.

Would it make Mr. Goodlatte feel any better to know that if the school board had ruled the other way, that the Federal Government might not have found that that had been any violation?

Mr. PATRICK. That's right.

Mr. GOODLATTE. If the gentleman would yield—I think he conceded that point earlier, and I think—

Mr. CONYERS. I see.

Mr. GOODLATTE [continuing]. That's fine, and I think that's good, but I still don't think that answers the underlying question of whether, if you're going to have no judgment on the basis of race, you don't ever get to that point by coming up with some alternative and requiring some alternative other than race to be the final deciding factor whether—regardless of what race a person—

Mr. WATT. But that just happens not to be the law. I mean, the court has consistently held that race can be a factor, and as much as you would like for it not to be—

Mr. GOODLATTE. Well, I think that's what we're debating here, is whether that should be a factor.

Mr. WATT. Should be the law?

Mr. GOODLATTE. That's right.

Mr. WATT. I thought we were involved in an oversight hearing.

Mr. GOODLATTE. Well, I think that—

Mr. WATT. I don't have any further questions.

Mr. GOODLATTE [continuing]. The nature of that hearing has definitely involved us in that debate.

Mr. WATT. I don't have any further questions, Mr. Chairman.

Mr. CANADY. Mr. Hoke.

Mr. HOKE. Thank you.

I'd like to continue to talk about the *Piscataway* case because I think it really is important, both in terms of the direction this administration has gone and the substance of the case itself.

My understanding is that when a State or a local government is going to use race to make an evaluation of qualification or to use it in any way with respect to a local program, that there are two tests. One is that the State must have a compelling governmental interest that would be served, and the second is that it be very narrowly tailored to remedy that—

Mr. PATRICK. That's the constitutional evaluation; that's right.

Mr. HOKE. OK. But I don't understand how *Piscataway* ever arises to that, and particularly how the word "diversity" has become enough of a compelling interest to justify the use of race in making a decision. You characterize the *Piscataway* question as coming down to whether or not that teacher or either of those teachers was entitled to a coin toss. I would pose it somewhat differently by saying, was the school district entitled to invoke "diversity" to make its decision?

Mr. PATRICK. Yes is the answer to that, under these circumstances. The reason I would take some issue with what you described as the strict scrutiny analysis, if you will, with respect to this particular case is that this was not a constitutional case. This was a case under title VII. It was a statutory issue. The affirmative

action plan of the Piscataway School Board was not under challenge. The particular employment decision was under challenge under Federal statute, title VII, and the evaluation we made—and I think it was the correct evaluation—is that there was no clear violation of Federal statutory law in that case. It was not brought or litigated as a constitutional case. It was brought and litigated up to the point I became familiar with it—that is, when it was up on appeal or going up on appeal——

Mr. HOKE. Yes, my understanding is that——

Mr. PATRICK [continuing]. As a Federal statutory——

Mr. HOKE [continuing]. As a factual matter, it was found that there was no discrimination and that, in fact, nobody alleged discrimination.

Mr. PATRICK. Well, Mrs. Taxman, the plaintiff——

Mr. HOKE. Right, she alleged discrimination in the case but not that there was a history of discrimination at the school.

Mr. PATRICK. Being in the system as a whole.

Mr. HOKE. Yes, in the system as a whole.

Mr. PATRICK. As a whole.

Mr. HOKE. Right.

Mr. PATRICK. I don't remember—I think it was not litigated. I don't remember what the positions—what the record——

Mr. HOKE. But that with respect to this case, what has happened is that the Department of Justice has reached its arm not only into this specific school district, but into a particular department within a specific high school. And it is using the principle of diversity as the justification. I don't know how that squares with the constitutional dictates on this——

Mr. PATRICK. Well——

Mr. HOKE. I understand what you said about it being a title VII case, not a constitutional one.

Mr. PATRICK. Well, I do want to be careful not to litigate this case on some other—we can talk about the constitutional issues in general, but I do want to be careful not to litigate constitutional issues in a case that is pending in the third circuit where there are no constitutional issues on the table.

But I remind you about circumstances under which this case came to me. It was the previous administration that reached into that local school board's singular decision with respect to a particular department and made a Federal case out of it. Now I like that adage—my staff knows—that life is what happens while you're making plans. I was not planning for this case, believe me. When I got on the job, there it was, and a judgment had to be made about what position we were going to take on appeal.

And when the matter was brought to my attention and the issues with respect to whether there had, in fact, been a violation of law were brought to my attention, we made the judgment we did to get out of the case——

Mr. CANADY. The gentleman will have an additional 3 minutes.

Mr. PATRICK [continuing]. Which is what we did. I think the broader question, Congressman, if I may, with due respect, that you're speaking to is the question of diversity as a justification for affirmative action, and I guess I would say two things about that. The President has made clear, I think—I can't remember whether

the question earlier was whether *Adarand* has an impact on our position in *Piscataway* or whether the President's—

Mr. CANADY. If Mr. Hoke would yield—that was the question. The only point I'd make about that, further on that, is that, as I understand *Adarand*, that's a decision that talks about the equal protection clause.

Mr. PATRICK. Right.

Mr. CANADY. So I think that what the court says about the requirements of the equal protection clause are relevant to that action by a governmental entity in *Piscataway*.

Mr. PATRICK. That was the law under the equal protection clause with respect to State and local activities after the *Croson* decision. So, in that sense, it wasn't new. I'm just talking about the issues that were actually litigated in the case and the basis of the district court's decision, which was what was on issue on appeal. There was a tremendous temptation with this—and, frankly, a lot of our cases—for people to debate issues that are outside of what it is we actually have to decide.

But the question that you raise, Congressman, is very much central to what we had to evaluate, and that is whether diversity was an interest that could be considered under Federal statutory law—

Mr. HOKE. Well, that's my concern, if I may interrupt, because it seems to me that diversity is desirable. I went out of my way to guarantee that my children go to schools where they will encounter a broad spectrum of people from various economic backgrounds and racial backgrounds and ethnic backgrounds.

But, as a matter of constitutional mandate, that seems to me pretty far afield from the constitutional mandate of nondiscrimination, and I'm very concerned that the Justice Department is going in the direction of making diversity a principle of its—a motivating principle of its actions, as opposed to the constitutional requirements that are placed upon it any when discriminatory action has taken place.

Mr. PATRICK. Well, I don't think there's a cause for concern there, but I think the courts have spoken, just as Justice Powell certainly did in the *Bakke* case; other Justices have, including Justice O'Connor, have referred in opinions in other cases to an interest in diversity as a governmental interest, particularly in the educational context.

Mr. HOKE. But an interest in diversity, as opposed to using it for a basis to inject in an aggressive way—I see my time has expired—

Mr. CANADY. The gentleman's time has expired.

Mr. Conyers.

Mr. HOKE [continuing]. In midsentence.

Mr. CONYERS. Thank you very much.

Would you like to finish? I yield to the gentleman.

Mr. HOKE. Thank you. I just wanted to say that there's a real distinction that ought to be drawn between the kind of aggressive activity that would work to eliminate discrimination and activity on the part of DOJ that would encourage diversity. Clearly the Supreme Court has very different positions on those two things, and

I'm concerned about the direction that the DOJ is taking with respect to that.

Mr. PATRICK. Well, again, I would ask you to consider the particular case which seems to be raising the concern——

Mr. HOKE. Right, and I'm not an apologist for the previous administration's having gotten you involved—to have that at your doorstep when you arrived. So——

Mr. PATRICK. It happens.

Mr. HOKE [continuing]. We all deal with what we have to deal with.

Mr. PATRICK. Indeed.

Mr. CONYERS. May I say to the Attorney General, could you go back to a larger frame of reference here? Sometimes in the course of our discussion things get a little confused. I, as a supporter of diversity, for example, it seems to me that diversity, that non-discrimination leads to diversity, but to what degree we actually encourage it is another matter. It seems to me that the constitutional predicates for the statutory law come out of the 13th and 14th amendments which deal very specifically with race. So that when we come through this legislative warped mirror here, we come up with ways of trying to minimize the importance of race, as the Court, as a conservative Court has done, and it leads us into tortured rationales about how and why things happen.

I think the *Piscataway* case, by being so close to the line, can hardly be held up to too much microscopic introspection. There were no violations of statutory law, and it's not a lot more complicated than that from my perspective.

Now the other matter that I wanted to raise with you in terms of general questions is the challenge of smaller government and its impact on the whole question of making America a more desegregated environment, an organization where there's less racism. We're grappling in another subcommittee of the Judiciary with the whole question of the Alcohol, Tobacco and Firearms activity in which one incident, the Tennessee Old Boys' roundup, for example, brought a chorus of criticism, but the fact of the matter is that incident really tells you what kind of environment exists within a government agency that is far more problematic than the incident itself. As a matter of fact, some of the people there were stunned that anybody was complaining about it because, in fact, it was an annual affair that they've been doing for years, and it shows you that—it shows me that within that agency there would probably be found—and that's what we intend to get to, and when I talk to Secretary Rubin, I'm not talking about how dare you allow this kind of social activity; the question is, what kind of environment exists in an organization that allows that to become commonplace, which turns us into looking at their employment practices, promotion practices, discriminatory claims. And we're talking about inside the Federal Government, Mr. Patrick.

When we look at the FBI, which has had historic problems of racial discrimination and prejudice and class action suits——

Mr. CANADY. I'm sorry, the gentleman's time has expired.

Mr. CONYERS. Well, what about the 3 minutes? [Laughter.]

Mr. CANADY. Oh——

Mr. CONYERS. I know it expired, but what else——

Mr. CANADY. I'm sorry, I thought the gentleman had already gone on for 8 minutes, but I apologize. The gentleman has 3 additional minutes.

Mr. CONYERS. Well, I thank the Chair. [Laughter.]

And I'm reminded that in this wonderful environment that we're working in there are members of this committee who plan to introduce legislation to abolish affirmative action as we know it. I mean, we're not talking about tailoring it or improving it; we're talking about going backwards in America.

But as we go through the law enforcement agencies that I've been working with across the years, the FBI, ATF, the Immigration and Naturalization Service has the biggest class action suit of racial discrimination and employment practices that has ever been brought, and it's still outstanding.

So your job in terms of mediating these problems around the country finds us in big problems—with a lot of problems inside the Federal system that we're still working on, which makes your role and your Department's role even more important, and that as we shrink government, guess what is most likely to get left on the cutting room floor? The funding and the programs that you espouse and that I feel are important that we continue to move forward.

And so I think we need to be very careful about where all of these huge cuts come from because, if we're not careful, these can be considered the kinds of matters that are expendable. Let the parties work it out. Let the private sector do its thing. And any reading of history will tell you that they're not going to do their thing; they're not going to work it out, and we're going to slip back into these problems of devastating statistics that are already showing their face now that we're recording racially-motivated violence, for example, but in more hidden ways in terms of unemployment statistics, in terms of not ending huge "ghettoizations" of urban centers in which opportunity and equal ability to succeed in this system are seriously curbed.

And so, as an advocate of your Department and program, I want to tell you you're doing a great job and consider us really at the cutting edge of where we go in this 104th Congress on these subject matters.

Mr. PATRICK. Thank you, Congressman.

Mr. CANADY. The gentleman's time has expired.

Mr. Frank.

Mr. FRANK. Hi.

Mr. PATRICK. Hi. [Laughter.]

Mr. CANADY. Welcome, Mr. Frank. We're glad you could join us.

Mr. FRANK. I've been doing Whitewater all morning; I don't need this. [Laughter.]

Mr. CANADY. Mr. Patrick. I take it that the gentleman yields back his time?

Mr. FRANK. I do.

Mr. CANADY. Mr. Patrick, we thank you for being here today. We appreciate your testimony. I have some additional questions which I'm not going to ask now, but I would like to submit those to you in writing and would ask that you respond. If other members—

Mr. FRANK. Let me just say I—having come late, the risk of my going over old ground is too great. So I wouldn't want to impose on others in this.

Mr. ROYCE. Mr. Chairman. Mr. Chairman. We had spoken previously.

Mr. CANADY. Mr. Royce.

Mr. ROYCE. I had some questions for the record that were going to be submitted—

Mr. CANADY. Yes, we will be submitting some questions.

Mr. ROYCE. And at this point in time, in light of the testimony, if I could ask just one brief question—could I be permitted to do that?

Mr. CANADY. Is there objection?

Mr. FRANK. Well, reserving the right to object, if we're going to set a precedent that nonmembers can do it, that's fine with me. I just—because I've had nonmembers on our side come and they were told they couldn't—I will not object, but I will want to extend the precedent to other nonmembers who might come and do that.

Mr. ROYCE. Well, I'll leave this in the hands of the chairman.

Mr. CANADY. We would be happy to submit your questions and we'll secure an answer for them.

Mr. ROYCE. All right.

Mr. CANADY. It has been our practice not to have nonmembers of the committee ask questions.

Mr. ROYCE. I certainly understand, Mr. Chairman, and so, in light of that, I will submit my questions.

Mr. FRANK. Sheila Jackson Lee was on her way as you started to ask that question.

Mr. CANADY. OK.

Mr. ROYCE. Thank you, Mr. Chairman.

Mr. CANADY. Thank you.

[See appendix.]

Mr. CANADY. Mr. Patrick, again, we thank you for being here.

Mr. PATRICK. Thank you, Mr. Chairman.

Mr. CANADY. I'd like to now ask that the members of the second panel come forward and be seated as Mr. Patrick is leaving.

Mr. WATT. Mr. Chairman, while this panel of witnesses—

Mr. CANADY. Mr. Watt.

Mr. WATT [continuing]. Is coming up—

Mr. CANADY. Mr. Watt is recognized.

Ms. WATT. I wonder if I might ask a question.

Mr. CANADY. Certainly.

Mr. WATT. I'm the last person that should say that I never—I always enjoy thoughtful discussions about civil rights, but I was under the impression that this was an oversight hearing, and I'm wondering if these witnesses are going to talk about the Justice Department or are they planning to talk about general civil rights theory or—I'm—

Mr. CANADY. Well, the gentleman from North Carolina will soon be entirely enlightened on that question because the witnesses will make their statements and you will hear what they say.

Mr. WATT. Well, I'd like to express my hope that it relates in some way to oversight of the Justice Department.

Mr. CANADY. I'm quite confident that the testimony we hear today will relate to the activities of the Department of Justice and the Civil Rights Division of the Department of Justice in particular.

I'd like to now introduce the members of our second panel. For our second panel, our first witness is Mr. Clint Bolick. As co-founder, vice president, and director of litigation for the Institute for Justice, Mr. Bolick engages in constitutional litigation to protect individual liberty.

Our next witness is Mr. Theodore Shaw, associate director/counsel of the NAACP Legal Defense and Educational Fund, Inc. Mr. Shaw is responsible for the supervision of the Legal Defense Fund's litigation program.

Mr. William Perry Pendley, our final witness, is president and chief legal officer of the Mountain States Legal Foundation, a non-profit, public interest legal center located in Denver, CO. He has argued cases on behalf of the foundation before the U.S. Supreme Court and the Federal courts of appeal. Mr. Pendley successfully represented *Adarand Constructors* in the recently decided Supreme Court case *Adarand v. Peña*, challenging race-based contract set-asides.

We're grateful that these three witnesses can be with us today. I'd like to now recognize Mr. Bolick. And we would ask that you confine your remarks to no more than 10 minutes each. However, we would also indicate that you should not feel compelled to take the full 10 minutes, but if you can summarize in less than that, that would be appreciated.

Mr. Bolick.

STATEMENT OF CLINT BOLICK, VICE PRESIDENT AND LITIGATION DIRECTOR, INSTITUTE FOR JUSTICE

Mr. BOLICK. I will be untrue to my lawyerly profession and take less than my allotted time, Mr. Chairman. It is a pleasure to be before this committee.

Mr. Chairman, a President who came to power preaching racial healing and denouncing quota gains and bean counters has pursued a divisive civil rights agenda purveyed by Mr. Patrick and other officials throughout his administration. Yesterday's announcement by Mr. Clinton that he will keep intact the Federal race and gender preferences regime makes it clear that he will continue pursuing policies that have strayed markedly from America's civil rights consensus.

I understand that a massive memorandum was issued to direct Federal agencies with respect to preference policies enough to make even a lawyer's eyes glaze over. That memorandum should be replaced by a simple two-word edict: "don't discriminate." Instead of the 160, or thereabouts, Federal race and gender preferences identified by the Congressional Research Service, Mr. Clinton has not yet recommended repealing a single one, not one, and, of course, Mr. Patrick did not add to that number this morning.

Meanwhile, Mr. Patrick has consistently wielded his civil rights law enforcement apparatus in favor of race-based programs and remedies. Upon taking his office, Patrick announced that he would defend "every single" racially-gerrymandered congressional district, even though the Supreme Court had held that sometimes they are

unconstitutional. He has defended contract set-asides, open-ended desegregation decrees, and race-based scholarships. He has advocated, as Mr. Hoke has pointed out, a diversity rationale that has no basis in legal precedent, that would remove any meaningful constraints from race-based remedies. He has induced private companies and local governments to agree, under threat of costly litigation, to remedies that no court would order, under theories of discrimination that are dubious at best. This is not civil rights law enforcement; it is ideological activism. Fortunately, the courts have rejected Mr. Patrick's more extreme positions over and over again.

Mr. Chairman, the overwhelming majority of Americans, including blacks and whites, oppose preferences. Such policies violate Americans' sense of fairness. And, as the Supreme Court has emphasized, in the rare and exceptional circumstances in which racial preferences are constitutionally permissible, they must be temporary, but 30 years after the Civil Rights Act they continue to proliferate. They are supposed to be a last resort, limited to circumstances when nonracial alternatives are unavailing. Instead, they are a first resort.

The *Adarand* case held that all racial preferences, all racial classifications of any sort, are subject to the strictest of scrutiny. According to an article by Jeffrey Rosen in the *New Republic*, the last time the U.S. Supreme Court has upheld a program subjected to strict scrutiny was in 1944, and, shamefully, it was the Japanese internment camps. That should mean that most of these 160 Federal preference programs go. My prediction is that, under the application of that precedent by this administration, few, if any of them, will go.

Apart from their unfairness, these policies sweep serious social problems under the carpet of preferences. We hear so much about why these programs are necessary to redress underrepresentation.

Mr. Chairman, the National Assessment of Educational Performance recently reported that only 12 percent of black high school seniors are literate in reading. The rate for whites is nearly as abysmal. That is on top of a high school dropout rate that for low income youngsters is 85 percent in some cities.

Racial preferences are tools of the 1960's and are utterly impotent in redressing the problems of the 1990's. Yet, while this administration has been busy defending what I call trickle-down civil rights—contract set-asides and the like—it has opposed efforts that would—is that 10 minutes?

Mr. CANADY. No, that's a mistake.

Mr. BOLICK. OK, thanks—that would expand the pool of individuals who can compete for opportunities. The Clinton administration opposes school vouchers for inner-city schoolchildren. It opposes repeal of the Davis-Bacon Act, which would open up tens of thousands of entry-level opportunities in the construction industry. It has tightened restrictions on tenant management and ownership of public housing. In short, the administration's position, flip-floppy though it may be, seems to be: preference, yes; empowerment, no.

Mr. Chairman, 200 years of history teach us that any exception to the principle of nondiscrimination, no matter how narrow, will be pried open enough to drive a truck through. The President said yesterday: mend it; don't end it. Discrimination of any sort is not

mendable. It is wrong. That is why we applaud your efforts, Mr. Chairman, and I think that nothing less than your efforts, to completely curb the Federal Government's power to engage in discriminatory policies is absolutely necessary, and this administration has demonstrated exactly why.

Thank you.

[The prepared statement of Mr. Bolick follows:]

PREPARED STATEMENT OF CLINT BOLICK, VICE PRESIDENT AND LITIGATION
DIRECTOR, INSTITUTE FOR JUSTICE

Quietly but ominously, the Clinton administration has set its civil rights policies on a radical Coarse permeated by race-consciousness, brazenly breaking candidate Bill Clinton's "new Democrat" assurances that he would pursue a politics of moderation and healing.

Clinton in his first two-and-a-half years has done nothing, absolutely nothing, to find common ground on race issues. Instead he has given over the entire federal civil rights apparatus to ideologues who pursue race-based policies in areas touching the lives of every American.

Above it all, Clinton presides with benign indifference, reining in the civil rights officials only when their more extreme mischief provokes public outrage. Otherwise they are left to pursue their own agendas, which they do with partisan zeal. Twelve years of "neglect" and "active hostility to civil rights progress," proclaims Justice Department civil rights chief Deval Patrick, "can be summed up in one word: Republicans."

But for ordinary Americans of all colors, these policies are unwelcome. For the nation's already simmering race relations, the administration's policies are incendiary. And they leave tragically unaddressed serious problems that are fomenting severe class divisions in our society.

SUBSTANCE OVER SYMBOLISM

During the 1992 campaign, Bill Clinton sought to recapture Democrats alienated by the party's support for race preferences and other social welfare programs. Clinton talked tough about welfare and middle class virtues. He responded to one critic: "If trying to restore the middle class in this country is a code word for racism, we are in deep trouble. We might as well fold our tent and go home."

For the most part, Clinton's rhetoric was soothing and conciliatory on race issues: "America needs to restore the old spirit of partnership, of optimism, of renewed dedication to common efforts," he declared. But it was Clinton's high-profile attack on Sister Souljah for her provocation of violence against whites that made believers among mainstream Democrats that Clinton would not be a hostage to extremists on race issues.

After the election, Clinton righteously rebuffed demands for more appointments of women and minorities to his cabinet, denouncing his critics as "bean counters" who were "playing quota games." And when his first nominee for assistant attorney general for civil rights, former NAACP Legal Defense Fund lawyer Lani Guinier, was assailed for her radical views, Clinton withdrew the nomination.

All this gave genuine new Democrats cause for optimism. Clinton's withdrawal of the Guinier nomination, proclaimed Will Marshall, president of the centrist Progressive Policy Institute, "reaffirms the stance he took during the campaign, which was unwavering support for civil rights . . . , but not support for quotas, group rights, or special preferences."

But it turned out Guinier was no aberration, for Clinton's appointees to virtually every civil rights post bear the same activist pedigrees. The list reads like a roll call of establishment civil rights groups. Deval Patrick worked with Guinier at the NAACP Legal Defense Fund (LDF). Patrick plucked Kerry Scanlon from LDF's ranks for one deputy position, and for another chose Isabelle Pinzler, director of the American Civil Liberties Union's Women's Rights Project.

At the Equal Employment Opportunity Commission (EEOC), Clinton appointed as chairman former Air Force counsel Gilbert Casellas, who previously worked for the Puerto Rican Legal Defense and Education Fund. The other two new commissioners are Paul Igasaki, who served as executive director of the Asian Law Caucus; and Paul Miller, formerly litigation director for the Western Law Center for Disability Rights. The commission's legal counsel, Ellen Vargyas, toiled in the litigation vineyards for the National Women's Law Center.

At the Department of Education, Clinton named as assistant secretary for civil rights Norma Cantu, regional counsel for the Mexican-American Legal Defense and Education Fund. Roberta Achtenberg, assistant secretary for fair housing and equal opportunity at the Department of Housing and Urban Development (HUD), worked as executive director of the National Center for Lesbian Rights. And Clinton elevated as chairperson of the U.S. Commission on Civil Rights long-time commissioner Mary Frances Berry, who came to national attention in 1985 when she opined that "civil rights laws were not passed to give civil rights to all Americans," but only to "disfavored groups" such as "blacks, Hispanics, and women."

These appointments mark an historical milestone: for the first time, an entire area of federal policy—in this case civil rights—has been handed over wholesale to a special interest lobby. They're operating out of new offices, but advancing the same agendas—with the federal government's mighty civil rights arsenal now at their disposal.

BEAN-COUNTING AS ART FORM

Notwithstanding Clinton's railings against "bean-counters" and "quota games," the command from the top is clear and unequivocal: absolute ethnic and gender parity in political appointments.

Ironically, the bean-counting has stymied civil rights law enforcement by delaying key appointments while the perfect mix was found. Limiting serious consideration of attorney general candidates to women left the Justice Department rudderless for months until finally third-choice Janet Reno was nominated. The Civil Rights Division was without a chief for more than a year as the administration searched for a black candidate rather than elevate one of the white career deputies.

But the most perverse display of bean-counting involved the EEOC, where the Clinton administration left the chairmanship vacant for 21 months as it searched for a nominee who, as the *Washington Post* described it, was "not just Hispanic," but specifically of "Puerto Rican descent." This "caricature of equal employment opportunity policy," the *Post* editorialized, comes "perilously close to institutionalizing some of the very distinctions as to ethnicity, race, gender and all the rest" that the commission is supposed to combat. Meanwhile, as Ronald Brownstein of the *Los Angeles Times* reported, the delay "left the agency foundering as it struggles to dig out from a massive backlog of more than 80,000 pending discrimination complaints."

Having survived the bean count, chairman Casellas now presides over an agency that is weighing such lofty questions as whether infertility, obesity, and nicotine addiction qualify for protection under the Americans with Disabilities Act. But even more pressing is a command from the Hill that Casellas purge from the agency anyone who deviates from the new political correctness. In an October 6, 1994 letter, Sen. Paul Simon reminded Casellas about

the agreement you made to me during your confirmation hearing. I had asked that as the new Chairman, you send to me a letter within six months regarding those in the agency who do not believe in the mission of the EEOC . . . [who] should be transferred to the Pentagon or someplace else.

If the purge victims turn out to be white males, they may find their problems only beginning at the Pentagon. On August 10, 1994, Undersecretary of Defense Edwin Dorn issued a memorandum implementing Secretary William J. Perry's call for "vigorous action" to increase the number of "women, minorities and persons with disabilities . . . among the Department's civilian managers." Remarking that "[p]rogress in this area comes one job at a time," Dorn directed that

I need to be consulted whenever you are confronting the possibility that any excepted position, or any career position at GS-15 level and higher, is likely to be filled by a candidate who will not enhance . . . diversity.

If this mechanism failed, Dorn warned, "we will need to employ a more formal approach involving goals, timetables and controls on hiring decisions."

Dorn's message was none too subtle. "As a white male, I can kiss my future goodbye," complained one GS-14 Defense Department employee to the *Washington Post*. "I am keeping Dorn's memo handy [in case] for some unexpected reason I do apply for advancement. It should serve as excellent prima facie evidence of discrimination due to race."

The administration's bean-counting obsession is so transcendent that hardly a personnel decision is made without considering "diversity" consequences. Perhaps most revealing was the memorandum recently reprinted in *Washington Monthly* from Roger Kennedy, National Park Service director, to some subordinates:

Surely, we must be able to find a use for a Swahili-speaking person who has Peace Corps experience, is a cum laude in English from Harvard and has a biological background in data manipulation. . . . Unfortunately, Mr. Trevor is white, which is too bad.

But "diversity" within the federal government isn't just about numbers, it's about right thinking. In January 1994, HUD established "cultural diversity" performance standards for managers and supervisors, evaluating them on such criteria as "speak[ing] favorably about minorities, women, persons with disabilities and others of diverse backgrounds"; "participat[ing] as an active member of minority, feminist or other cultural organizations"; and "participat[ing] in EEO and Cultural Diversity activities outside of HUD."

HUD's directives were condemned by the Senior Executive Association as violations of freedom of speech and association. "While the law requires that employees not discriminate for or against anyone on the basis of race, color, religion, sex, [or] national origin," the association wrote HUD's Achtenberg, "it does not, in fact, require that career executives become advocates for particular groups and adopt their agendas." An apt complaint, but not one likely to sway those who see no difference between enforcing the law and advancing an agenda.

JUSTICE'S PURSUIT OF PREFERENCES

Far more significant than the quota regime installed within the federal government are the social engineering policies imposed upon the rest of us in the guise of civil rights.

Though civil rights policy is diffused among many agencies, the fulcrum is the Justice Department's Civil Rights Division, where Deval Patrick rapidly is shedding any pretense of impartial law enforcement in favor of unbridled ideological activism.

Both Patrick and Attorney General Janet Reno projected moderate images on race issues at their confirmation hearings. Reno assured Senator Hank Brown (R-CO) that "Quotas shouldn't be used anywhere, sir."

Patrick was even more demure. A racial quota, meaning "a particular number which is both a ceiling and a floor," is "against the law," responded Patrick to a query from Sen. Strom Thurmond. But even "affirmative action," which is "something different from that"—namely, "goals and timetables" that "starts with recruitment and training"—"has to be reserved for limited circumstances, and has to be flexible," Patrick testified. "And I understand that to be the law of the land and part of the responsibility of the division in abiding the law of the land, sir."

Patrick's fidelity to the law lasted less than five months. The vehicle Patrick chose to signal a new direction was *United States v. Board of Education of Piscataway*, a New Jersey reverse discrimination case the Justice Department won on behalf of white schoolteacher Sharon Taxman, who was fired during a reduction-in-force in order to retain a black teacher with equal seniority. The school board previously resolved such matters with a coin flip, but this time decided by race in order to preserve "diversity." The case was brought by the Bush administration, but prosecuted by the Reno Justice Department before Patrick's arrival.

Federal courts have allowed the limited use of race only to remedy an employer's past discrimination or gross statistical disparities. In this case, neither justification was availing since the school board had an exemplary record of minority hiring. Judge Maryann Trump Barry refused to accept the board's "diversity" rationale since it would allow "boundless" race preferences—precisely what advocates of "affirmative action" desire—and she struck down Piscataway's blatant act of discrimination.

But this victory Patrick and company could not abide. At first, they inclined toward merely sitting out the appeal, forcing Ms. Taxman to defend the decision alone in the Third Circuit Court of Appeals. But Patrick's deputy, Kerry Scanlon, pressed for a bolder approach: switch sides altogether.

Scanlon prevailed, and Patrick himself signed the motion to realign the United States with the party it had just successfully prosecuted for violating the Civil Rights Act of 1964. Patrick thumbed his nose at a long series of Supreme Court decisions, declaring in his motion that the trial court applied "an unduly narrow interpretation of the permissible bases for affirmative action."

Patrick and Scanlon miscalculated the public response and soon were backpedaling. Patrick declared at a news conference that the case was "unique and narrow," since it involved "two teachers who were equally qualified and identical in seniority." But still he defended the underlying logic, insisting that "the concept of faculty diversity does not favor one race over another." But no matter how narrow the facts of this case, if Patrick succeeds in introducing the concept of "diversity" as a jus-

tification for racial preferences, it will remove any meaningful limits on government's power to engage in reverse discrimination.

Patrick can implement much of his agenda without filing a single lawsuit. When the Justice Department knocks at a door and threatens to unleash its vast litigation arsenal, rational people often turn compliant. Hence Patrick and others who possess civil rights law enforcement authority are not ultimately bounded so much by what a court might approve, but only to what a school board or employer or elected official might "voluntarily" agree.

The latest episode involves Fullerton, California, on whose doors Patrick knocked recently, bearing a charge of employment discrimination in one hand and an invitation to surrender in the other. If Fullerton acquiesces, it will have to submit to quota hiring for its police and fire departments and a host of other race-conscious mandates, even as it is laying off employees. If it refuses, it will have to bear massive costs to defend itself: nearby Torrance already has spent over one million dollars in 21 months of litigation against a similar Justice Department lawsuit. Either way, the city loses.

The mayor, Julie Sa, insists the city is guilty of no wrongdoing, and is aware of no individual claims of discrimination. Rep. Edward Royce (R-CA) on March 10 asked Attorney General Janet Reno on March 10 to explain the charges against Fullerton, but to date has received no reply.

The Justice Department wants the city to produce a 44.3 percent minority applicant pool, including 9.1 percent blacks, in a city whose minority population is 37 percent minority and 1.9 percent black. Its statistical analysis seems to draw more from the Los Angeles metropolitan area, which is more heavily minority than Fullerton, rather than from Orange County, which has fewer. Fullerton is in Orange County, about 22 miles from the City of Los Angeles.

Patrick demands that the city sign a consent decree obligating it to actively recruit in minority-targeted media and other outlets designed to increase minority hiring. Failure to achieve racial parity will trigger Justice Department scrutiny. The city must also hire on a priority basis to minorities who applied (or felt discouraged from applying) for entry-level police and fire positions since 1985, and to pay back pay and benefits. The decree is similar to others secured by Patrick with Hialeah, Florida and Macon County, Georgia. Regardless of whether actual discrimination has occurred, Patrick has made it clear he will deploy his law enforcement arsenal to achieve racially proportionate outcomes.

Chevy Chase Savings & Loan learned this last August 22, when Reno and Patrick announced a consent decree the financial institution signed to avoid prosecution for lending discrimination. The Justice Department produced no evidence that Chevy Chase discriminated in loan approvals. Rather, it charged the savings & loan had insufficient branch offices in certain minority census tracts, which in Reno's and Patrick's eyes amounted to illegally "shunning" a "community."

Under the unprecedented settlement, Chevy Chase agreed not only to open new branches, but to adopt hiring quotas, approve loans for blacks at below-market rates, provide grants to cover down payments, and advertise in minority-owned media outlets, including "at least 960 column inches" of advertisements in black-targeted newspapers.

As Cornell law professor Jonathan Macey charges, "The government's willingness to proceed with litigation in the absence of evidence of discrimination" is "scandalous in a nation that purports to be governed by a rule of law." Instead of prosecuting banks that actually discriminate—or dealing with underlying problems that discourage banks from opening offices in low-income areas—Patrick seems determined to pursue high-profile cases that more resemble naked extortion than civil rights law enforcement.

Rather than fight overwhelming odds, the Mortgage Banking Association, the nation's largest mortgage lending association, engaged in pre-emptive capitulation. Roberta Achtenberg announced in September an agreement with the association that calls upon members to bolster minority lending, advertise in minority media outlets, and "encourage development of a work force that reflects the cultural, racial and ethnic diversity of the lenders' market."

Meanwhile, new Clinton regulations will make Patrick's job easier by demanding racial identification from applicants for consumer or business loans under \$1 million. And in case the federal civil rights arsenal is inadequate to the task, Patrick and deputy Scanlon are urging private-sector lawyers to take up litigation. "You can make money on fair housing cases," Scanlon recently told a lawyer group.

In the area of voting rights, too, Patrick is also committed to racial line-drawing. Condemning the Supreme Court's recent *Shaw v. Reno* decision striking down racially gerrymandered election districts as "alternately naive and venal," Patrick has organized a seven-member SWAT team within the Civil Rights Division to defend

against "every single challenge" to such districts. The Justice Department's extensive resources supplement a half million dollar grant awarded by the Carnegie Foundation to the Lawyers' Committee for Civil Rights for the same purpose earlier this year. This year, the Justice Department has filed Supreme Court briefs defending blatant racial gerrymandering in congressional districts in Louisiana and Georgia, even as courts have subjected the Department to criticism for coercing states to engage in racial line-drawing.

Patrick's voting rights campaign bodes especially depressing societal consequences. Grounded on the premise that racial groups have different interests and can be represented only by members of the same race, it will render racial division a self-fulfilling prophecy by constructing a system of electoral apartheid.

BEYOND JUSTICE

Companies subject to heavy federal regulation are easy prey to social engineering schemes, perhaps none so susceptible as those who depend on Federal Communications Commission (FCC) licenses for their existence. In January 1994, the FCC issued new rules imposing heavy fines on broadcasters for failure to meet explicit quotas for hiring minorities and women.

And in what the *New York Times* called the "biggest affirmative-action program in decades," the FCC voted to set aside half of 2,000 licenses for wireless "personal communications services" (such as portable phones and pagers) for firms owned by minorities and women, and to provide licenses for such companies at up to 60 percent below market value. One analyst valued the benefits at a half billion dollars.

Like all set-asides, the FCC program is welfare for the wealthy. They are also prime for abuse: as the *Times* reports, the 50 percent minority ownership threshold means that "a company could still qualify for the full range of preferences even if huge corporate investors acquired 75 percent of the equity and 49.9 percent of the voting stock." Moreover, the program cannot possibly satisfy constitutional requirements: since the licenses involve new communications technologies, by definition there can be no "past discrimination" to justify racial or gender preferences of any sort.

But constitutional constraints are no impediment to the Clinton administration. In 1993, HUD launched a Fair Housing Act investigation against three Berkeley residents for opposing a planned homeless shelter in their neighborhood, threatening each with fines up to \$100,000 and a year in jail if they did not turn over all their records, including lists of their coalition's members. HUD subsequently disclosed similar investigations around the country, aimed at suppressing what Heather MacDonald, writing in the *Wall Street Journal*, described as "textbook examples of petitioning the government for a redress of grievances."

After widespread publicity, HUD's Achtenberg backed down, conceding that the "Berkeley citizens" acted within their First Amendment, free-speech rights." She pledged that "every attempt is being made to ensure that HUD's inquiries . . . do not have a chilling effect on political activity or the exercise of free speech." But, warned Achtenberg, "We can anticipate more cases of this kind."

The Education Department's Norma Cantu was similarly red-faced when it was disclosed that her Office of Civil Rights was investigating Ohio's high school proficiency examinations—even after a federal court ruled the tests were not racially biased. The 2.6 percent of graduating seniors who failed the exam—about one-third of whom were black—were offered a 10-hour summer remediation course and another chance to pass. But the racially disproportionate results were intolerable to Cantu, who backed down only when challenged by Rep. Bill Goodling (R-PA) and 14 other members of Congress.

The Department has persisted, however, in its support for race-exclusive college scholarships. Reversing a Bush administration policy emphasizing disadvantage over race, Education Secretary Richard Riley last January embraced race-based scholarships, calling them "a valuable tool for providing equal opportunity and for enhancing a diverse educational environment."

ZERO-SUM CIVIL RIGHTS

The major effect of embracing race rather than disadvantage in college scholarships—conferring benefits to the offspring of Marion Barry and Jesse Jackson rather than the children of Anacostia—seems to have escaped the Clinton administration. But the policy exemplifies Clinton's approach to civil rights: redistributing benefits and opportunities on the basis of race, rather than engaging in any meaningful effort to develop common-ground solutions to the problems facing society's most disadvantaged members.

Such race-based policies are enormously divisive yet have done little to stem the widening gap between mainstream Americans and the growing underclass. And while the Clinton administration pursues racial entitlements, it has resisted fiercely efforts to empower low-income people such as school choice, tenant management of public housing, and repeal of the Davis-Bacon Act, a racist law enacted in 1931 that prevents many low-skilled workers from entering the construction trades.

The courts consistently have rejected the race-conscious aspects of the Clinton administration's civil rights agenda. In three cases this Term, the U.S. Supreme Court repudiated the administration's positions in desegregation, set-asides, and racial gerrymandering. These and other court decisions repeatedly emphasize that race-based remedies must be limited to the most extraordinary circumstances. Both public policy and judicial precedents make clear that a new approach is necessary.

A forward-looking approach to civil rights policies should be based upon two key factors:

(1) "Affirmative action" resonates little among most disadvantaged minorities. Few low-income people have ever benefited, or are in a position to benefit, from most affirmative action or set-aside programs, which concentrate their benefits on individuals with substantial skills or connections.

(2) Americans of all colors still share common values and aspirations. Low-income people want the same things as other Americans: safe neighborhoods; decent schools; opportunities to own a home, pursue work or business opportunities, and seek a better future.

These two basic factors provide the antidote to Clinton on civil rights: a strong renunciation of divisive racial preferences coupled with progressive policies to empower disadvantaged individuals to earn a share of the American Dream. Legislation to empower low-income parents with school choice, as Representatives J.C. Watts, Dave Weldon, and Steve Gunderson have proposed, along with welfare reform legislation that removes economic disincentives to work and family formation, are good places to start.

The time has come to enact a new civil rights bill, curbing the federal government's power to discriminate once and for all. Effective civil rights law enforcement does not require racial preferences. Indeed, racial preferences attack the symptoms rather than the causes of the problems afflicting the truly disadvantaged. Any "review" of affirmative action policies that leaves discriminatory practices intact will do nothing to bring Americans closer together or to solve serious social problems. I encourage this Committee to hold the Clinton Administration accountable for its broken promises on civil rights, and to move forward with legislation that will fulfill the promise of equal rights for all Americans.

CIVIL RIGHTS TALKING POINTS

America's moral claim is staked in its doctrinal commitment to civil rights. Congress should take a bold, principled stand on civil rights, based on the original civil rights vision of equal opportunity and individual freedom.

Congress should pass a civil rights bill removing government from the business of racial discrimination, once and for all.

Race-based affirmative action, as an exception to the principle of nondiscrimination, was supposed to be narrowly-drawn and temporary. Thirty years later, racial preferences permeate the American landscape.

The Congressional Research Service, in a report for Sen. Dole, identified 160 race and gender preference programs at the federal level. Most are the product of executive orders and federal regulations, not statutes. The civil rights bill would forbid such preferences.

Two of the largest preference programs are:

the Office of Federal Contract Compliance Programs (OFCCP), established not by statute but by Executive Order 11246, which requires all public contractors to adopt "goals and timetables"; and

section 8(a) of the Small Business Act, creating benefits supposedly for socially and economically disadvantaged individuals, but administered as a set-aside program for companies owned by minorities and women.

The bill would not require any modification of existing civil rights laws. To the contrary, existing civil rights laws were designed to prohibit discrimination of all sorts. The civil rights bill would fulfill that intent.

Likewise, the U.S. Supreme Court has approved racial preferences only where necessary, temporary, and narrowly tailored to redress specific past discrimination. The federal programs do not satisfy this exacting constitutional standard.

"Affirmative action" is not the same thing as the antidiscrimination laws. Those laws will remain on the books and should be strictly enforced.

Public opinion polls show large majorities (over 70 percent) of men and women oppose racial preferences, including a large percentage of minorities (usually close to 50 percent). At the same time, a majority favors "affirmative action."

Affirmative action does not have to mean discrimination. Many current programs (such as 8(a)) purport to provide assistance to individuals who are "socially and economically disadvantaged," but instead are administered to employ race and gender preferences. After the civil rights bill is adopted, such assistance must be targeted to the truly disadvantaged, without discrimination on the basis of race and gender.

The bill also makes an explicit exception for nondiscriminatory affirmative outreach and recruitment efforts.

The bill does not affect the ability of private entities to engage in affirmative action efforts that comply with the Civil Rights Act of 1964.

Current affirmative action is "trickle-down civil rights": benefits conferred on the members of the designated groups who have the greatest skills and resources, in the name of those who are outside the economic mainstream.

The Clinton administration has violated its own injunction against "bean counters" and "quota games." It has relentlessly supported race-based policies in employment, voting, contract set-asides, and other areas of public policy. The courts have rejected the administration's civil rights arguments in virtually every major case.

The administration's review of preference programs is illusory. The problem is not "abuses" in such programs; it is that such programs, by their very nature, discriminate on the basis of race and gender. Government's power to confer benefits and opportunities on the basis of race and gender must be curbed, once and for all.

The tools of the 1960s are inadequate to the civil rights challenges of the 1990s. Preference programs divide Americans on the basis of race, but do little to remedy the real problems separating people from basic opportunities.

In addition to strict enforcement of antidiscrimination laws, we should remove barriers that prevent the disadvantaged from controlling their destinies, such as:

- enterprise zones and repeal of regulatory barriers to economic opportunities, including the Davis-Bacon Act;
- school choice for low-income inner-city families;
- meaningful welfare reform that removes disincentives to productive livelihoods;
- tenant management and ownership of public housing; and
- making the streets safe.

Mr. CANADY. Thank you, Mr. Bolick.

Mr. Shaw.

STATEMENT OF THEODORE M. SHAW, ASSOCIATE DIRECTOR AND COUNSEL, NATIONAL ASSOCIATION FOR THE ADVANCE- MENT OF COLORED PEOPLE, LEGAL DEFENSE AND EDU- CATION FUND

Mr. SHAW. Thank you, Mr. Chairman.

I do not have a written statement at this time, but I may submit one later. I want to underscore that the NAACP Legal Defense Fund, though it was started by the NAACP as a completely separate organization, has been now for most of its existence. This is the organization that was led by Thurgood Marshall, litigated *Brown v. Board of Education*, *Greene v. New Kent County*, *Swann v. Charlotte-Mecklenburg Board of Education*, the *Dowell* case recently in the Supreme Court involving school desegregation, *Jenkins v. Missouri*, and many of the major employment discrimination and voting rights cases and civil rights cases in other areas of the law.

I take it that, since this is an oversight hearing, that there is strong support among all members of the committee—I know this is true—for enforcement of antidiscrimination statutes, and I assume that that bottom-line minimum is why we may take off on other discussions, because those issues are not in dispute. And I am sure and I appreciate the fact that the committee and the Con-

gress will continue to adequately fund the Division to make sure it can carry out its antidiscrimination mission.

I started off my legal career some years ago at the Justice Department in 1979 in the Civil Rights Division. There was a change of administrations very shortly after I came on, and then for the remainder of my time at the Division I found myself engaged in a dialog with those who were leading the Division about the direction of the Division.

After leaving the Justice Department and joining the Legal Defense Fund, I often found that we were at odds with the Department, and, in my view, for the 12 years between 1980 and 1992 the Department departed from its mission with respect to civil rights enforcement in many respects. Now I'm sure that those sitting at the table with me and some of those on the committee have another view of that. I respect that view. However, I want to make clear that Mr. Bolick's views, although he attempts to portray the Civil Rights Division and the Legal Defense Fund as outside of the mainstream and radical, are not in any respect views that are mainstream, nor are they views that are not ideologically motivated. We may have different views, but I don't think that he can claim in any legitimate way to speak with an objectivity that outweighs the objectivity of those with whom he disagrees.

I will not address many of the distortions I think that he has engaged in, and not only in his testimony, but in the past with respect to the views of individuals like Lani Guinier and of Deval Patrick. I think that many of those distortions do a great disservice to individuals of high integrity, and they are not—those distortions are not necessary with respect to the kinds of disagreements, legitimate disagreements, that one can have. I think they do a disservice to a legitimate and reasoned discourse among people who disagree in good faith.

Let me say, though, that I am troubled greatly by much of the discourse on issues of race and on issues of affirmative action in particular, that we hear in this country, and even, indeed, within the Congress. Unfortunately, I think some of that discussion or much of that discussion is rooted neither in history nor in fact. Race discrimination continues to remain a reality in this country, and when I say "race discrimination remains a reality," I mean race discrimination against women, against people of color, against those who have historically been excluded.

Much of the discourse that occurs today has an Orwellian nature in which black is white, up is down, and many of us act and talk as if the history of discrimination in this country is largely a history of discrimination against white Americans. In my view, there is no such thing as reverse discrimination, not because white Americans cannot be discriminated against—indeed, they can be and they are at times. When they are, that discrimination ought to be rooted out and it ought to be addressed, but that is not reverse discrimination that merits a specific special category; it is simply plain discrimination, and it is illegal if it is not consistent with the Supreme Court's interpretation of the law.

Having said that, discrimination is not the same as being affected by an affirmative action program or an effort to open up avenues of opportunity and to include. I don't have time, given the

limitations here, to expand on that, although I'd be glad to do so in response to questions or in written testimony.

Let me turn to *Adarand* for a few moments. *Adarand* did not say that affirmative action is unconstitutional, and, indeed, *Adarand* is not in any respects the final word on this issue. The program at issue in *Adarand* was not even declared unconstitutional by the Supreme Court. It was sent back for further review under the standard of strict scrutiny which has now been extended to Federal affirmative action programs. It is important to keep that in mind.

Adarand is one case, only one case, which may be important to all of us, but it is, by no means, the entire battle. Although Mr. Randy Pech has been, as we will hear, fighting his particular struggle since 1989, that is only one chapter with respect to the long struggle against discrimination fought by women and people of color in this country.

Secondly, I want to say that, with respect to the issues that are raised in affirmative action, we welcome the discourse about economic status in this country. We welcome that discourse. We welcome a discourse about opening up opportunities for all Americans regardless of race. That discourse overlaps with, but is not the same as, it is not identical to, the discourse about what must be done to continue to eradicate the vestiges of past and continuing discrimination which we all know continues to be rampant in this society. We need to have a discussion about issues of class and about opening up opportunities to all Americans, including white Americans of modest economic circumstance. So I want to underscore that.

I question, however, whether some of the people who are advocating that we look at nonrace-based affirmative action measures—that is, economic status-based affirmative action measures—as a substitution for race-based affirmative action—are really interested in pursuing that discussion in a very heart-felt way because many of those individuals are the same individuals who are waging war on poor people with respect to other policies and practices that are at issue in much of the social and political discourse these days.

Let me use as a quick example before I conclude, a story was in the paper last week about the continuing need for addressing race discrimination. The story, which I assume we're all familiar with, having to do with credit lending practices, in which the explanation advanced for disparities between equally-qualified minorities and white people who were seeking loans was that white loan officers might not be racists, but that they may have more cultural affinity which then gets played out in the loan-making decision. Well, cultural affinity is a phrase—I'm not sure exactly what it's supposed to mean, but to me it ends up meaning that institutional racism is practiced; it doesn't mean that the people who make these decisions have horns on their head. They're not evil people necessarily. Discrimination is very complex, very subtle, and is something that occurs even when people don't consciously intend to be mean-spirited. But that requires affirmative steps and measures to root out the effects of those practices.

Let me conclude by saying that this discourse is not about the election in 1996 or Republicans or Democrats. It is about the soul of this country and what this country is going to be, and long after

any of us are here I think this country will continue to grapple with the issues of fairness and race, ethnicity, and gender. And the question is whether we contribute toward making this society a more inclusive one when we have our turn at the plate.

Thank you, Mr. Chairman.

Mr. CANADY. OK, thank you, Mr. Shaw.

Mr. Pendley.

STATEMENT OF WILLIAM PERRY PENDLEY, PRESIDENT AND CHIEF LEGAL OFFICER, MOUNTAIN STATE LEGAL FOUNDATION

Mr. PENDLEY. Thank you, Mr. Chairman and members of the committee. I have been three times honored this year: first, to have been able to appear on behalf of Adarand Constructors, Inc., before the U.S. Supreme Court; second, to have been in the courtroom when the opinion by Justice O'Connor was announced; and, third, to join with you today following President Clinton's statement yesterday regarding the future of race-based decisionmaking by Congress.

In 1989, after the *Croson* decision was handed down by the Supreme Court, Mountain States Legal Foundation began a search for a client to give the Supreme Court another opportunity to consider its decision in *Fullilove v. Klutznick*, the 1980 decision in which the Supreme Court upheld race-based decisionmaking by Congress that was limited in extent and duration.

In late 1989, when Randy Pech walked in our door fresh from losing yet one more contract due to his race, our search ended and our long battle began. Our long battle, I might add, given the rhetoric in the media about "angry white men," our long battle on behalf of Randy Pech and his wife Valerie, who, during the long struggle to build their company, stood shoulder to shoulder with him.

Contrary to what many in the press say, the decision in *Adarand* is, in fact, a return to fundamental principles, fundamental principles that have guided the Supreme Court on race-based decisionmaking since 1942. Justice O'Connor enunciated those principles very clearly: No. 1, "skepticism" regarding any use of race as odious to a free society; No. 2, "consistency" in applying the same standard, regardless of the race of the individual burdened and the individual benefited; and, No. 3, "congruence," the idea of ensuring that, regardless of the level of government involved, Federal, State, or local, the same standard would be applied. Of course, the Court concluded that that standard, as it has been since 1942, is strict scrutiny, requiring a compelling governmental interest and a narrow tailoring of the relief to ensure the achievement of that objective.

We achieved the three objectives that Mountain States Legal Foundation set out to achieve in addition to winning on behalf of our client: No. 1, to overturn *Metro Broadcasting*, which we thought was wrongly decided; No. 2, to overturn *Fullilove*, which we regarded as a gross deviation from the Court's consistent application of strict scrutiny; and, No. 3, to require the application of strict scrutiny to the Federal Government.

But I should point out that, although we won on all three counts, the battle for our client, Randy Pech and his wife Valerie, is not over. In fact, we're back essentially to where we were almost five years ago, when on August 10, 1990, we filed our complaint. I have no doubt at all, notwithstanding Mr. Patrick's statement this morning, that the U.S. Government will fight us tooth and nail every inch of the way in defending the program that we have challenged.

Although we have removed the two major obstacles that limit the ability of American citizens to demand the equal protection guaranteed under our Constitution—that is the *Metro Broadcasting* case and the *Fullilove* decision; this is a battle that will have to be fought client by client, case by case, courtroom by courtroom. Given the toll that I've seen I might point out that, just days before the Supreme Court announced its decision in *Adarand*, Randy Pech lost one more contract because he's white.

The real question, I think, that begs to be answered is: is it fair; is it right; is it just for Congress, given its obligation to ensure adherence to the Constitution, to sit by and watch these private litigants go in courtroom after courtroom to try to achieve the relief, to try to ensure the adherence to the Constitution's guarantee of equal protection that the Supreme Court has recently ruled upon in *Adarand*, or is not more properly the responsibility of Congress to take a look at these programs and determine, frankly, that they should not be funded, pending the careful, thorough, thoughtful inquiry into whether or not these programs would survive constitutional challenge. Should that burden be placed upon the Randy Pechs of the country rather than be taken on by Congress to determine whether or not these programs should go forward in light of the Supreme Court's recent decision and, frankly, in light of a review of appendix A and appendix B contained in the Government's brief, where it sets out its best case in support of the survival of these programs.

There's something else. The something else is what happened on November 8 of last year, in 1994, 7 weeks after the Supreme Court announced its decision to hear our case. The American people decided against big government, a decision I think against social engineering, a decision against the injustices and the unfairness the American people see in these types of programs, seeking instead a return to what I think is the aspirational goal of all Americans: a colorblind society.

I recommend that Congress zero out these programs until such time as it's able to conduct a thorough review, and even though I think it might be legally possible to structure a program that would meet strict scrutiny, I don't think any programs currently survives. Although it may be possible to establish a record that would meet that test, I think the real question is: should Congress do it? And I would say, as a public policy answer, "no."

One of the advantages of appearing before the U.S. Supreme Court is the fact that all the great statements, all the great ways of expressing one's self on these issues have already been written. The great legal thinkers on the Court and the clerks who have served them over the years have provided great language that the lawyer appearing before the Court need only quote. There are two great statements that I ran into as I prepared to appear before the

Court I'd like to share with you today. One is a statement of Justice Brandeis found in Chief Justice Burger's opinion in the *Fullilove* case where Justice Brandeis said, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches its lessons to the whole people."

The question that we need to ask in a time when our aspirational goal is a colorblind society, the elimination of discrimination, the dream of the American people to treat each other decently, and according to character and not skin color, is: is this a lesson our Government ought to be teaching the people?

Finally is the statement by Justice Powell: "the day cannot come soon enough when we will no longer judge people on the immutable characteristics of race." I hope that day came the day the Supreme Court announced its decision in *Adarand*.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Pendley follows:]

PREPARED STATEMENT OF WILLIAM PERRY PENDLEY, PRESIDENT AND CHIEF LEGAL OFFICER, MOUNTAIN STATE LEGAL FOUNDATION

INTRODUCTION

Mr. Chairman, Members of the Committee on the Judiciary. I have been thrice honored this year: first, by having been permitted to appear before the United States Supreme Court on behalf of *Adarand Constructors, Inc.*, on January 17; second, by having been present in the Courtroom when Justice Sandra Day O'Connor announced the decision of the Court on June 12; third, by having been asked to appear before you today to address the future of the Constitution's equal protection guarantee in light of the Supreme Court's landmark ruling in *Adarand Constructors, Inc. v. Peña*.

THE SETTING

Adarand Constructors, Inc. v. Peña, et al. had its origins in 1969 when President Richard Nixon signed an Executive Order requiring federal agencies to implement what we now call affirmative action. Less than 10 years later, when Congress considered the Public Works Employment Act (PWEA)—a \$4 billion economic stimulus program—Congressman Parren Mitchell (D-MD) offered an amendment to set-aside a portion of the program for minority business enterprises. As part of his justification for the non-controversial nature of his proposal, he asserted that his program was one building upon prior administrative practice. In the sponsor's words, "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government."

It may not have been controversial to Congressman Mitchell but it was controversial to many Americans who thought it violated the Constitution's guarantee of equal protection. Less than a month after the regulations implementing the PWEA were finalized, a facial challenge to the statute's constitutionality was filed in New York City. In 1980, that lawsuit—known as *Fullilove v. Klutznick*—reached the U.S. Supreme Court. In an opinion by Chief Justice Warren Burger, the Court upheld the set-aside provision, citing both the limited extent and duration of the program as well as its flexibility.

THE YEAR OF 1989

Nearly a decade after *Fullilove*, in the case of *J.A. Croson v. City of Richmond*, the Supreme Court declared that Richmond's race-based set-aside program was unconstitutional. Although Justice O'Connor's majority opinion was deferential as to what Congress might do regarding racial matters given Congress' unique powers, it was clear that states and local governments could not undertake race-based remedies without meeting two very demanding tests: the program had to serve a compelling governmental interest and the remedy selected had to be narrowly tailored.

That same year, Mountain States Legal Foundation (MSLF) was in the process of litigating a challenge to the State of Utah's implementation of a federal highway construction program (*Ellis v. Skinner*). Litigating on behalf of a highway subcontractor, MSLF took the position that before Utah could implement the 10 percent set-aside adopted by Congress, Utah had to determine that the 10 percent quota

was justified in Utah. Since Utah's minority population was only 6 percent, MSLF argued that the 10 percent quota could not be justified.

We saw *Ellis v. Skinner* as falling somewhere between *Fullilove*—and its holding that Congress could utilize race-based remedies—and *Croson*—and its holding that state and local governments could not use such race-based programs without fact finding. Although we were ultimately unsuccessful in *Ellis v. Skinner*, as we studied *Croson* in preparation for *Ellis* we reached an inescapable conclusion: the Supreme Court appeared ready to reconsider the result in *Fullilove*. We decided to find a case that would permit a direct challenge to a congressional race based program.

Then in the Summer of 1989, the Central Federal Lands Highway Division (CFLHD) of the Federal Highway Administration and the U.S. Department of Transportation issued a solicitation for bids to construct nearly five miles of highway along the West Dolores River in Montezuma and Dolores Counties in extreme southwestern Colorado. Subsequently, the winning bidder sought a subcontractor to perform the guardrail portion of the contract. Although Adarand Constructors, Inc., a small, family-owned business located in Colorado Springs, Colorado, operated by Randy Pech, submitted the lowest bid, it was denied the subcontract.

Instead the guardrail subcontract was awarded to a business certified as a "Disadvantaged Business Enterprise" ("DBE") under a federal program that, in this case, provided a \$10,000 bonus to the prime contractor for awarding the contract, not to the lowest bidder, but to the lowest minority bidder. For Randy Pech, the loss of the West Dolores Project was the last straw. He came to MSFLF to ask if we would represent him in suing the federal government.

When Randy Pech walked in our door, we realized we had our direct challenge to a federal program. After meeting with Randy and getting to know him, we also realized we had the perfect client—a genuine nice guy who, through no fault of his own, had just finished last. We told Randy we would take his case. We also told him that we were going to lose at the district court; we were going to lose at the court of appeals; but that maybe, just maybe, if we were really lucky, the Supreme Court would hear his case. On August 10, 1990, a year to the day after the CFLHD issued its solicitation on the West Dolores Project, Randy Pech filed his lawsuit.

PLEADINGS BEFORE THE COURT

Our advice to Randy Pech was right. Both the U.S. District Court for Colorado and the U.S. Court of Appeals for the Tenth Circuit made short work of our lawsuit. As far as they were concerned, the U.S. Supreme Court had answered our challenge with its decisions in 1980 in *Fullilove* and in 1990 in *Metro Broadcasting Corporation v. FCC*—in which the Court upheld the federal government's policy of awarding some television broadcast licenses on the basis of race. Those decisions, held the Tenth Circuit, required application of intermediate, not strict, scrutiny in reviewing a race-based program adopted by Congress. Under that standard, the program passed. We disagreed. We thought Randy Pech's case deserved a closer look.

Contrary to Chief Justice Burger's opinion in *Fullilove*, the race-based remedy adopted by Congress in 1977 was limited neither in extent nor duration. For people like Randy Pech, Congress' policy of awarding contracts based on race, which began with the adoption of the PWEA in 1977, continued. In 1982, Congress adopted the Surface Transportation Assistance Act (STAA); superseded in 1987 by the Surface Transportation and Uniform Relocation Assistance Act (STURAA); and in turn replaced in 1991 with the Intermodal Surface Transportation Efficiency Act (ISTEA).

While the Small Business Act (SBA)—which had its own affirmative action program—required the President to set aside at least five percent of all contracts for "socially and economically disadvantaged enterprises" ("DBE's"), STAA, STURAA and ISTEA set the minimum level at 10 percent. In addition, federal agencies were required to provide a "maximum practicable opportunity" for DBEs to participate in government contracts. As a result, the CFLHD set its own DBE goal at between 12 percent and 18 percent of its contracts.

One of the methods the CFLHD utilized to achieve its goals was the Subcontracting Compensation Clause ("SCC"). Under the SCC, a prime contractor would be awarded a cash bonus of between 1½ and 2 percent of the amount of the contract if at least 10 percent of the work was performed by a certified DBE. It was the SCC provision that was the inducement for the prime contractor in Adarand to award the guardrail contract, not to Adarand, but to a DBE. In fact, the prime contractor signed an affidavit stating that, "but for" the SCC bonus payment, the guardrail work would have been awarded to Adarand.

Even more troubling than the bonus payment—which was made on the basis of race—was Congress' definition of "socially and economically disadvantaged." Congress presumed that all "Black Americans, Hispanic Americans, Native Americans,

[and] Asian Pacific Americans" were "socially and economically disadvantaged" regardless of their social background or economic status. In fact, state agencies were instructed, in certifying businesses as DBEs, to "rel[y] on this presumption" and "not [to] investigate the social or economic status of individuals who fall into one of the presumptive groups."

In *Fullilove*, Chief Justice Burger wrote that "simply because Congress' program presses the outer limits of congressional authority didn't mean the program should be stricken." In our view, the Congressional program in *Adarand* went beyond the breaking point. Thus, when we filed our Petition for Writ of Certiorari, we asked three questions: (1) whether "strict scrutiny" rather than "a lenient standard, resembling intermediate scrutiny" is the proper standard to determine the constitutionality of a race-based program adopted by Congress; (2) whether broad-based societal discrimination, rather than clearly identifiable discrimination perpetrated by a government entity, is a sufficient basis for the adoption of a race-based program; and (3) whether the CFLHD was required to conduct a factual inquiry before it adopted a race-based goal in excess of that approved by Congress.

Much to the surprise of the U.S. Government, whose opposition brief gave our petition the back of the hand, on September 26, 1994, the Supreme Court agreed to hear our case.

THE DECISION IN ADARAND

In a stunning decision that was the lead story on each of the three major television networks (ABC, CBS, NBC) the night of June 12, 1995, as well as banner headlines the next day on every newspaper in the country, the U.S. Supreme Court ruled in favor of MSLF.

By a vote of 5-4, the Supreme Court ruled that the Constitution requires the Court to apply the same standard in considering race-based decision making, regardless of the unit of government involved, whether federal, state, or local. That standard, held the Court, is one of "strict scrutiny," a test that requires the government to demonstrate both a "compelling governmental interest" in using race and "narrow tailoring" in achieving that interest.

The Court's decision in *Adarand* overturned its 1990 decision in *Metro Broadcasting v. Federal Communications Commission*, where the Court upheld the ability of Congress to use race to award television broadcast licenses. The Court also effectively reversed its 1980 decision in *Fullilove v. Klutznick* where it first held that Congress could use race as a factor in awarding government contracts. Both of the earlier decisions applied a much more lenient standard to race-based decision making by Congress and were the basis for earlier rulings by the federal district court in Colorado and the U.S. Court of Appeals for the Tenth Circuit against *Adarand*. Those decisions were vacated by the Supreme Court and the case remanded for a decision consistent with the Court's holding in *Adarand*.

Justice O'Connor, writing for the Court declared:

"Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.' . . . Second, consistency: 'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.' . . . And third, congruence: '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.' . . ."

"Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."

"Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." (Emphasis added.)

"There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons."

The Supreme Court's decision as to what the Constitution's guarantee of equal protection means, when applied to Congress, now shifts the burden to Congress and the Clinton Administration. Congress must determine whether or not to continue funding race based programs that may fail to meet the "strict scrutiny" test announced by the Supreme Court. President Clinton, who shortly after oral arguments in *Adarand* announced a review of affirmative action, to decide what race-based pro-

grams currently in place can demonstrate a "narrow tailoring to achieve a compelling governmental interest."

WHAT'S NEXT FOR ADARAND CONSTRUCTORS, INC.

In MSLF's representation of Adarand Constructors, Inc., the three objectives were achieved: first, *Metro Broadcasting* was overturned; second, *Fullilove* was effectively reversed; and third, "strict scrutiny" was applied to Congress. Although the two major impediments to victory for our client Randy Pech—the *Fullilove* decision and the *Metro Broadcasting* decision—were removed by the Court's decision in *Adarand*, we are now back where we began nearly five years ago when on August 10, 1990, we filed our lawsuit.

Randy Pech is still losing contracts because of the policies being examined by this Committee today. Furthermore, despite his victory before the Supreme Court, Randy Pech must return to federal court in Colorado and battle the nation's largest law firm: the U.S. Government. I have absolutely no doubt that U.S. Department of Justice attorneys will fight tooth and nail against Randy Pech and Adarand. Notwithstanding President Clinton's promise in February to conduct "an intense, urgent review" after which, according to *The Washington Post*, the Administration would "protect[] those that can be shown to work and jettison[] or alter[] the rest," and notwithstanding the indefensible nature of the program challenged by Adarand, the Department of Justice will fight us every step of the way.

One example of this "take no prisoners" approach is what the Department of Justice did when the Supreme Court agreed to hear our case. In its Brief on the Merits, the Administration raised two new arguments: first, that the statutory presumption that all listed minority group members were "socially and economically disadvantaged" and thus DBEs was rebuttable by Adarand; second, that Adarand lacked standing since it had never shown that the DBE in the case was certified due to the race of the owner, rather than some finding of economic disadvantage.

As to the first, the burden of ensuring the Constitution's guarantee of equal protection should not rest on the backs of men like Randy Pech and his tiny company. When Congress adopts a program, the burden should be upon the U.S. Government to ensure that the program makes distinctions that are constitutionally permissible. At the very least, those who are the beneficiaries of such programs should be required to demonstrate that they possess the necessary qualifications. The Randy Pech's of this country should not be required to prove that a particular DBE is not qualified.

Furthermore, in the real world in which Randy Pech functions, he is incapable of challenging the DBE status of his competitors. Neither does he possess subpoena power to obtain the necessary documents nor is there a forum for him to present those documents or other evidence on the record to challenge the findings of state or federal agencies. (This assumes there is an objective standard upon which to declare an entity "socially [or] economically disadvantaged" and there is not.) Even if Randy Pech could have taken the time out from his guardrail business to engage in such a challenge and was successful in decertifying one DBE, he would have to begin the process over again with the next DBE and the one after that, and on and on.

Moreover, had Randy Pech challenged the DBE status of the firm awarded the guardrail subcontract, the government contracting officer would have issued a stop work order. Thus Randy Pech would have succeeded in infuriating the prime contractor who would find himself with equipment on site and no contract to perform. At the same time, the DBE, accused of a felony—being an illegal DBE—might well file a lawsuit against Pech.

As to the second issue, that of Adarand's standing, the fact that the Department of Justice raised the issue, for the first time before the Supreme Court, demonstrates the lengths to which the government will go to defeat an adversary.

At the federal district court, both sides had filed a motion for summary judgment, agreeing on the facts that presented the court with the legal issues involved. At the Court of Appeals, the facts remained undisputed, the only questions being the constitutional ones we had argued from the beginning. It was stunning, therefore, that the Solicitor General took the position that we had never proven a key aspect of our case: that the racial presumption had been applied to Gonzales. Of course, it had been applied.

Randy Pech had testified during his deposition that Gonzales was certified as "a DBE" because "he is a minority." Moreover, three top federal officials in the CFLHD had testified that they knew of no situation in Colorado where a DBE had been certified on any other basis than the presumption. That testimony was made all the more compelling by the fact that the prime contractor had been required to provide

the CFLHD with evidence of the subcontractor's DBE status. Thus, the CFLHD knew, and had in its possession the documents proving, the basis upon which Gonzales had been certified. Finally, there was the fact that state agencies were required, under federal Department of Transportation rules, to certify as a "DBE" anyone who was a member of one of the enumerated racial groups. Since government officials are presumed to perform their duties, that is what happened with Gonzales.

As a legal matter, the Solicitor General's position made no sense. Adarand had demonstrated that at least one of the bases for the federal government's decision in the awarding of the subcontract had been an illegal one—the use of race. As a result, under numerous Supreme Court precedents, the burden of proof had shifted to the federal government. The federal government now had to prove that race was not the reason for awarding the guardrail subcontract to Gonzales. Thus, the government had to show that the presumption had not been applied to Gonzales.

A review of the legal guidance provided by Assistant Attorney General Walter Dellinger demonstrates that the Administration will attempt to weaken the Supreme Court's holding in *Adarand*.

For example, Mr. Dellinger states that "*Adarand* basically extends the *Croson* rules of affirmative action to the federal level—with the caveat that application of those rules might be somewhat less stringent where affirmative action is undertaken pursuant to congressional mandate." (Emphasis added.) Memorandum at 9. Mr. Dellinger finds authority for such a caveat in the following language from the opinion:

It is true that various Members of this Court have taken different views of the authority 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress's exercise of that authority. (Citations omitted.) We need not, and do not, address these differences today. [*Adarand* at 29.]

Mr. Dellinger makes the argument that the deference given to Congress should be greater than that afforded to state and local governments. Mr. Dellinger suggests that "Congress may be able to rely on national figures of discrimination to justify remedial racial and ethnic classifications." Memorandum at 2. Furthermore, after Congress has developed familiarity with the nature and effects of discrimination, "Congress need not redocument the fact and history of discrimination each time it contemplates adopting a new remedial measure." Memorandum at 31. The most significant ramification is that Congress may be able to redress the effects of society-wide discrimination through the use of racial and ethnic classifications that would be "impermissible if adopted by a state or local government." Memorandum at 32.

I don't believe a fair reading of the Court's holding in *Adarand* permits the conclusions to which Mr. Dellinger has arrived. The majority in *Adarand* make it clear that the obligations of the Federal Government (including Congress) is to be "equivalent to that of the States." *Adarand* at 13–14. The majority opinion held that "all racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand* 25–26. Thus, Congress is clearly not exempt from strict scrutiny, a level of scrutiny that is to be "equivalent" between Congress and State and local governments.

The majority opinion cited three key statements that refute Dellinger's view that Congress may be able to rely on national figures or that Congress need not redocument a justification for an affirmative action program. The first one states that an individual is entitled to a judicial determination that the burden he is asked to bear "is *precisely tailored* to serve a compelling governmental interest." *Adarand* at 23 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). (Emphasis added.) The second one states that strict scrutiny is a tool to ensure that "the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Adarand* at 24 (citing *Croson* at 493). The final one is the statement Justice Stevens made in *Fullilove* declaring that "*Unless congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification*, the Court should not uphold [an affirmative action statute]." *Adarand* at 27 (citing *Fullilove*, 448 U.S. at 545 (dissenting opinion)) (Emphasis in *Adarand*.)

Obviously, given these strong statements, Congress may not rely on past studies or general figures. Moreover, Congress will need to narrowly tailor each and every affirmative action program which it approves.

Yet another example of the lengths to which the U.S. Government will likely go to defeat challenges to the constitutionality of federal race-based decision making is contained in Mr. Dellinger's discussion, at pages 19–20 of the meaning of "narrow

tailoring." For example, he suggests that there might be a trade off between compelling governmental interest and narrow tailoring, that is, if there is a strong compelling governmental interest there may be less strict narrow tailoring and vice versa. He makes this assertion, and gives this advice to federal counsels even though he admits on page 20 that "the Supreme Court has never explicitly recognized any trade-off between" the two.

THE DUTY OF CONGRESS

The Supreme Court's decision as to the meaning of the Constitution's guarantee of equal protection, when applied to Congress, now shifts the burden to Congress and the Clinton Administration. The Dellinger Memorandum and the announcement yesterday by President Clinton demonstrate unequivocally that Randy Pech's long battle is just beginning.

Congress has an obligation as well. An obligation to determine whether or not to continue funding race-based programs that may fail to meet the "strict scrutiny" test announced by the Supreme Court. In light of the manner in which these programs were adopted, with minimal fact finding, and with little of what the Supreme Court demands in the way of "narrow tailoring," it is unlikely that any of them could survive "strict scrutiny."

Thus the question before Congress, beginning with this hearing, is whether the burden will be placed upon the Randy Pechs of the world to ask the federal judiciary to consider these programs on a case-by-case basis, with the enormous cost in money and time that involves, or whether Congress will shoulder the burden. I believe Congress should perform its constitutional responsibility by zeroing out these very questionable programs pending a thorough, thoughtful review at such time Congress considers the reauthorization of programs in which race is a factor in federal decision making.

Randy Pech began his long battle in the Fall of 1989, when few gave his challenge much chance for success. Although most discussions one hears today admit that race-based decision making is wrong, in 1989, when Randy Pech challenged the United States Government, he stood virtually alone. Imagine the surprise of the nation, when, on September 26, 1994, the Supreme Court agreed to hear his case.

But something had happened in American in the weeks and months following the Supreme Court's decision to hear our case. Six weeks after the Court decided to grant *certiorari*, the American people rendered their decision. One of the issues that played a part in the election—according to pundits like David Frum, author of *Dead Right*—was the matter of affirmative action. A short time later the California Civil Rights Initiative—which would compel race-neutral decision making by the nation's largest state and is all but guaranteed a place on the ballot in 1996—was announced. Then commentators from both ends of the political spectrum weighed in against race-based decision making. From the left, Richard Cohen of *The Washington Post* wrote: "[Affirmative action] has outlived its usefulness. . . . [I]t violates the American creed that we must be judged as individuals, not on the basis of race or sex. . . ." From the right, Pat Buchanan said: "[I]t's time to make law in America what it always should have been in the Land of the Free: color blind. Wasn't that the dream?"

There was something else obvious in the vote last November. The fact that the American people are fed up with big government and the tools and toys of big government, what many people call "social engineering." In his 1994 book, *Civil Wrongs: What Went Wrong with Affirmative Action*, Professor Steven Yates sets out the tenets of that philosophy: that there is a social elite that should determine national policies; that those policies should be imposed by the federal government; that American society is systemically flawed; and, that it is permissible to burden individual members of society if it serves group goals.

While anger over federal race-based decision making is, in part, the result of a perception of unfairness and inequity as well as the reality of lost jobs and denied opportunities, something more is at work here. (I would add as well, that it is not just the so-called "angry white men," but their wives and families who have seen, first hand, the destructive impact of race-based social engineering that imposes a destructive burden upon innocent members of our society. One of those individuals is Valerie Pech who has worked side-by-side with her husband Randy to build the company.)

That something is the American peoples' view of the role of the federal government in their lives. More and more Americans are discovering the flawed philosophy upon which big government programs are based and they find it repugnant.

That very same thing is happening on environmental issues. While much of the opposition to environmental policy gone wild flows from regulatory overkill, lost jobs

and imperiled property rights, millions of Americans are responding to the philosophy of social engineering that underlies radical environmental policies.

If Congress wishes to be true to the mandate it was given in November 1994, then it must begin now to put an end to big government's use of social engineering to make decisions based on race.

CONCLUSION

One of the great things about appearing before the U.S. Supreme Court, especially for a word smith, phrase maker, speaker and writer such as myself, is the fact that I didn't have to craft great phrases to address the issue before the Court. The best words and phrases have been developed over the years in opinion after opinion by the nation's greatest legal thinkers. Who could improve, for example, on Justice Harlan's plea, in his powerful and prophetic dissent in *Plessy v. Ferguson*, for a color blind Constitution? You can't read these opinions and not be struck by the power of the language and the brilliance of the men and women who crafted them.

Perhaps my favorite quote regarding this case appeared in a footnote in Chief Justice Burger's opinion in *Fullilove*. It was particularly fitting in light of the fact that discrimination on the basis of race has been unconstitutional since 1954, has been illegal since 1964, and has been immoral for millions of people for centuries. Nevertheless, there is one place in America where race-based decision making is still permitted: the federal government. Thus Justice Brandeis' words had particular meaning for me: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

Justice Powell once wrote, "the day cannot come soon enough when we will no longer judge people on the immutable characteristics of race." I hope that day came on June 12, 1995, when the Supreme Court announced its decision in *Adarand v. Peña*.

Mr. CANADY. Thank you. I want to thank each of the witnesses again for being with us today. We appreciate your helpful testimony.

There's an issue I want to go back to that I got into a little bit with the Assistant Attorney General. It has to do with the use of the word "quota." That's not a word that I use very often because I think the more descriptive term is "preferences," and I think that is a more accurate term to describe the whole range of policies that we're talking about and that some of us have problems with.

But, Mr. Bolick, in particular, could you comment on what the President has said about quotas and what the Assistant Attorney General had to say on that subject? Do you have anything to say about that?

Mr. BOLICK. Well, I think that the—I also do not use the word "quotas" anymore because it locks one in a semantical battle that does not seem useful in getting to the issue. I use "preferences" or flat-out "discrimination." The one thing that Mr. Shaw and I agreed on is that—or it seems to me we agreed on—is that there is no such a thing as reverse discrimination; there is just discrimination. And it is odious regardless of who its victim is.

But when Mr. Patrick sat here and told this panel that a set-aside that sets aside a specific number or amount contracts for which eligibility is determined on the basis of race or gender—to say that that is not a quota strikes me, to use Mr. Shaw's term, as absolutely Orwellian.

Another example of that that didn't come up this morning, Mr. Patrick has defended the use of race-exclusive scholarships. That is a situation where a certain pot of money is available only to members of designated groups. It is a 100-percent quota. If that is not a quota, then nothing is a quota. And it seems to me that that kind of extreme measure, where you are actually setting aside ben-

efits on the basis of race or gender, are exactly what the Supreme Court has said when it has said that these things are unlawful.

Mr. CANADY. OK. Let me ask about the impact of the *Adarand* case on the Executive order program that's administered by the Office of Federal Contract Compliance in the Department of Labor. As you know, that Office requires government contractors to determine areas in which certain groups are underrepresented in their employment and to establish hiring and promotion targets to correct those alleged deficiencies.

Now this Federal compulsion sounds to me like a program that is totally divorced from any sort of individualized determination that such action is necessary to serve a compelling governmental interest. It really sounds to me like the Government is simply using its contracting authority to enforce a vision of racial proportionality in private sector companies that happen to be government contractors.

I'd like to ask Mr. Pendley and Mr. Bolick to comment on that and the implications of the *Adarand* decision for this program of enforcing requirements on government contractors.

Mr. PENDLEY. Well, I think certainly the first issue is that the Supreme Court has said we're going to apply the same standard; we're going to apply the same standard of strict scrutiny, to Congress, that we have traditionally applied to State and local governments, at least since *Croson*. The only caveat that the Justice Department, Mr. Dellinger, brought up was the possibility that there might be some court deference to Congress with regard to its responsibilities under section V of the 14th amendment. I don't think there would be not similar deference with regard to the executive branch and its attempt to implement a program, certainly with almost no factfinding involved.

I think the real question that remains with regard to the other race-based programs adopted by Congress is whether or not they can survive, given the factfinding, the limited factfinding that the Congress engaged in with regard to those programs.

Before Mr. Bolick responds further on this question, if I could add a matter onto the quota question. In the case that we litigated the threshold goal that was established was 5 percent; the President "shall" achieve 5 percent with a requirement also that each agency, "to the maximum extent practicable," provide opportunity to socially and economically disadvantaged, which is a totally open-ended ceiling of up to 100 percent, at least with regard to the—

Mr. CANADY. My time has expired. Without objection, I'll have 3 additional minutes.

Mr. BOLICK [continuing]. The central—

Mr. WATT. Mr. Chairman. Mr. Chairman, reserving the right to object.

Mr. CANADY. The gentleman from North Carolina is recognized.

Mr. WATT. And I hope the chairman won't think I'm being rude or impolite. In fairness, I do think we ought to go through the panel, through the members, the first time around observing the 5-minute rule for the benefit of some of us who have to leave.

Mr. CANADY. Well, if the gentleman objects, the gentleman objects and we will do that.

Mr. FRANK. If the gentleman would withhold—

Mr. WATT. But I don't want to offend——

Mr. FRANK. Will the gentleman withhold? Will the gentleman withhold?

I missed much of it. Why don't you go, and you go take my time, if you have to leave, and I'll switch with the gentleman from North Carolina.

Mr. WATT. I'll withdraw my reservation.

Mr. FRANK. I'll switch with the gentleman from North Carolina that way, since I wasn't here for most of the morning.

Mr. WATT. All right.

Mr. PENDLEY. With regard to the Central Federal Lands Highway Division, which was responsible for implementing the program under which Mr. Pech challenged the goal that they established internally was 15 to 18 percent. So we can see how these little opportunities suddenly evolve into a very hard quota that, as far as the officials at the Central Federal Lands Highway Division were concerned, they could not deviate from.

Mr. CANADY. Mr. Bolick.

Mr. BOLICK. Just to add to that, a number—one of the prongs that is often overlooked in the *Adarand* test is narrowly tailored. The programs not only have to have these findings, regardless of whether they're after the fact or before the fact, but they also have to be narrowly tailored, and one aspect of that is that nonracial alternatives must have been considered. And to my knowledge, in none of the instances, as far as Federal programs are concerned, have nonracial alternatives ever been considered. In fact, many of the programs are written, including this one, to confer assistance to socially and economically disadvantaged individuals. These programs have never been administered in that way, but, in fact, have been operated as racial preferences.

So I think that when the review is contemplated and conducted, if those guidelines of the Supreme Court are taken at all seriously, these programs simply are not going to pass constitutional muster.

Mr. CANADY. Thank you, Mr. Bolick.

Mr. Watt, the gentleman from North Carolina.

Mr. WATT. Thank you, and I want to assure the chairman that I was not trying to be offensive to him; I was just trying to get us in a position——

Mr. FRANK. The gentleman has to leave. So that way we can accommodate him.

Mr. WATT [continuing]. Since we're engaging in more—less oversight and more philosophical discussion.

Let me make a couple of comments about Mr. Bolick's testimony first and then ask a question maybe to Mr. Pendley, in particular. If I understood what you were saying in the voting rights context, redistricting context, you objected—and I'm talking about oversight here now because this is what this hearing is about—you seemed to be voicing some objection to the fact that the Justice Department has defended some congressional districts which the Court has held unconstitutional, as you characterize it. I guess that would be Georgia?

Mr. BOLICK. No, actually, just to clarify, Mr. Watt, what I was objecting to was that Mr. Patrick announced in advance, before conducting an analysis of these districts, that he would defend all

of those districts, and what I believe a law enforcement officer's duty is is to assess in each individual instance whether the constitutional obligations have been complied with before he reaches the result of whether they are constitutional or not.

Mr. WATT. Well, I'm troubled by that because it sounds to me like you, as a general—first of all, the Justice Department has not been involved in every one of the redistricting cases, either because the Court hasn't allowed them to be involved or because they haven't sought to be involved. In North Carolina, for example, the Justice Department is not a party, doesn't have an independent standing in that case. And so notwithstanding what you suggest is a generalized statement, if that generalized statement was made, that has not been the followthrough of the Justice Department. And I thought what you were saying was that somehow the Justice Department ought to decide in advance which cases the Supreme Court was going to decide one way or another, and not take any cases other than cases that it happens to win. I mean, I just—

Mr. BOLICK. No, of course that is not my position.

Mr. WATT. I just want to make sure that you understand that I think that's kind of a ridiculous proposition.

The second point that I thought you made was that the Justice Department's legal theories have been rejected over and over again by the Supreme Court. Did I hear you say—

Mr. BOLICK. And other courts; for example, in *Piscataway*.

Mr. WATT. And I don't think my recollection is that the Justice Department has lost more cases than it has won during the time that this particular Justice Department is there. Am I mistaken in that? Have they lost disproportionately more cases than they have won?

Mr. BOLICK. Mr. Watt, my—

Mr. WATT. Can you just answer that question?

Mr. BOLICK. I do not know the answer to that question.

Mr. WATT. OK. Well, I—but you are representing that they have had their positions rejected over and over again, suggested that you had some statistical basis for saying that, and I didn't think you did. But even if you did, I would submit to you that the President has lost a lot of battles here in the Congress, but it doesn't mean that the President ought to give up and just lay down for the Congress to walk over him.

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. WATT. The Justice Department has a responsibility to assert positions based on the law and based on its understanding of the law. So I just wanted to make those clarifications.

Now, Mr. Pendley—and other members of the panel, too, I guess I should open this up to, since we're having a generalized philosophical discussion here about colorblindness.

Mr. FRANK. Yes, Mr. Shaw may not get paid for this last half hour.

Mr. WATT. I doubt if he's getting paid for it, anyway. [Laughter.]

What are we to do about the 30 percent, essentially—and this is not scientific; this is based on polling information, but, generally, it's about 30 percent—of the North Carolina population, white population, which in polling says point blank under no circumstances will I consider voting for a black candidate? In this effort to be col-

orblind as a government, what should our response to that be? Should we just ignore it and assume that it does not exist, and continue to create majority white districts, for example, where that 30 percent which is taking into account race controls who gets elected? Can you all address that for me? I'm just—I'm troubled by that because I don't understand what it means that we can somehow be colorblind in a society where the individual members of our Nation are not colorblind.

Mr. BOLICK. Mr. Watt, first of all, I want to correct—I said Mr. Patrick's more extreme position——

Mr. WATT. I've moved on to this position now.

Mr. BOLICK. OK.

Mr. WATT. I don't have much time. I—Mr. Pendley actually kind of created this——

Mr. PENDLEY. I think what ought to happen is we ought to have vigorous enforcement of the civil rights laws in Mr. Patrick's Division. When there are——

Mr. WATT. I'm talking about, in the voting rights context, how are we going to—how are we going to deal with that 30 percent of the population that says under no circumstances am I going to vote for anybody black?

Mr. PENDLEY. I don't know how you deal with the situation where people are unwilling to make decisions based on any other factors except——

Mr. CANADY. The gentleman's time has expired.

Mr. Goodlatte.

Mr. WATT. Could I request the gentleman to let him answer the question——

Mr. GOODLATTE. Yes, absolutely. Go ahead and answer that question, Mr. Pendley.

Mr. WATT [continuing]. Since I've been kind enough to do the same in reverse?

Mr. PENDLEY. Except with regard to when those opinions become obvious with regard to performance or actions or activities where someone is discriminated against and someone is injured, and then there are remedies under our laws——

Mr. WATT. But aren't those candidates injured? They can't get elected. I couldn't get elected. I mean, I'm a pretty educated guy. I'm not a bad-looking guy. I'm pretty articulate. [Laughter.]

But, I mean, you know—but those 30 percent of the people said they're not out to be Jesus Christ, they said, and if I'm black, they're not going to vote for me.

Mr. GOODLATTE. Let me reclaim my time and follow up on this same point because I think it's a worthwhile point, and I think it comes to the heart of these issues.

If both of the candidates of the major parties were black, I don't know what those 30 percent would do. I think that's an interesting question.

Mr. WATT. They'd probably stay home. [Laughter.]

Mr. GOODLATTE. If—well, they might; I don't know.

Mr. WATT. That's right.

Mr. GOODLATTE. I don't know. I don't know.

Mr. WATT. I don't say that facetiously.

Mr. GOODLATTE. Now if you reversed that and you gave a choice between a white candidate and a black candidate, I think the percentages might be even higher who would say they were going to vote for the black candidate.

Mr. FRANK. That's not what he said. That's not what he said. He said they would never vote for one, not that they would choose one versus the other.

Mr. GOODLATTE. OK. Well, leaving that aside—

Mr. FRANK. That's a different formulation.

Mr. GOODLATTE [continuing]. Looking at the question of how people, unfortunately, make that decision on that basis—and they should not do that, and I fully agree with that.

Mr. WATT. That doesn't expand the question, though—just if you would yield—

Mr. GOODLATTE. But let me—

Mr. WATT [continuing]. I mean—

Mr. GOODLATTE. No, no, but let me go to the point that I want to make here because I've got a limited amount of time, too. And that is this: if you create districts based upon race to create the opportunity to be elected, aren't you making a major tradeoff in the black community by doing that. I don't want—I'm going to address it to these folks. I'd like to talk to you about it sometime, too, Mr. Watt.

But because every other district that you create in North Carolina has a lessening effect upon the need of the candidates in those districts to appeal to the needs of black voters in terms of their representation in the Congress, that seems to me gets to the heart of the problem. It is definitely true that creating these districts creates a greater representation in the Congress on the part of blacks. I would concede that in a minute. But I think what's wrong with it is that it creates a tremendous polarizing effect in the Democratic Party, in particular, in the Congress, in that in order to be elected from all of the other districts in North Carolina, you have got to make an appeal to a more conservative, if you will, group of voters, whether you're a Republican or a Democrat, and, therefore, the kind of person that gets elected in those districts is not necessarily in the interest of representing the interests of all the people in the country, including the black community.

Would any of you care to address that problem?

Mr. SHAW. I'd love to address it. A few observations on that, that dilemma:

First, I think that at the heart of that dilemma is the fact that if there was not a difference, or a perceived difference, between the interests of African-Americans who are in majority black congressional districts and white Americans who are in majority white districts, then this issue wouldn't be a problem. In other words, why is it that the election of Representatives from majority white districts, by your own question, is not in the interest of African-Americans? It seems to me that what you're putting your finger on is the fact that nobody wants to admit or discuss that race continues to be a great divide, painfully so, in this country, but we are hell-bent on declaring ourselves colorblind, whether we are or not.

In these Southern States, in North Carolina—and let me take Louisiana, one of the States that was before the Supreme Court.

No black person since Reconstruction has ever been elected to any statewide office, no black person since Reconstruction has ever been elected to the State legislature from a majority white State legislative district, no black person has been elected to Congress, and if left to the majority of white voters—

Mr. CANADY. The gentleman's—

Mr. SHAW [continuing]. David Duke would be Governor today.

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. GOODLATTE. All right.

Mr. SHAW. Let me just say one other thing, if I may.

Mr. GOODLATTE. All right, quickly.

Mr. SHAW. Because I think on the issue of colorblindness—and this goes back to the chairman's question to Mr. Patrick earlier—I am one of those people, and I don't want to be misrepresented on this point, who would say that colorblindness really isn't my goal. My goal is fairness and inclusiveness. I think we're going to continue to see color in this society, just as we see gender, just as we see—

Mr. GOODLATTE. Well, let me reclaim my time.

Mr. SHAW. The question is not whether we see in color; the question is what—

Mr. GOODLATTE. Mr. Chairman—

Mr. WATT. Mr. Shaw—

Mr. CANADY. It's the gentleman's time, please. He's—

Mr. GOODLATTE. He's taken quite a bit of time and I have very little.

Let me just say that I don't—I don't disagree that we have, as the gentleman from North Carolina has indicated, a problem with people still making a decision based upon race. I would also say that we've made tremendous progress. I live in a city that for 17 years had a black Republican mayor, the finest mayor that the city has ever had, and I think that we are making progress in that regard, but I'm not sure that that progress continues when you polarize by creating a situation where you're saying that we're going to create districts for the purpose of getting that representation, and then leaving the other districts where you're not going to get elected for the purpose of doing that. Those districts disenfranchise the minority, just as the minority districts that are created enfranchise the minority.

Mr. Bolick, did you want to comment on that?

Mr. BOLICK. Mr. Goodlatte, I agree. Mr. Watt raised the question of how we can get that 30 percent done and out of the way, get their attitudes changed. I don't know how you do it, but I know how you don't do it, and you don't do it by perpetuating those segregated lines, by allowing people not to have to deal with each other in the rough and tumble of politics. What if in 1954 we had said white kids and black kids are never going to get along in school and we said, therefore, we will segregate them? Thankfully, we didn't make that decision. We said they're going to have to get along or you'll have to leave. And that's what we should be doing in congressional districting, is saying in a race-neutral system we will have some majority black districts; we will have majority white districts, but we will also have a lot of districts in which black voters will have very potent influence and in which whites and blacks

are going to have to learn how to get along. That is the goal of the Voting Rights Act. That is the goal of the Constitution.

Mr. GOODLATTE. Thank you. Let me add that the city of Roanoke is about 22 percent black. I mean, this is definitely an instance where an individual was elected, in my opinion, on the merits that they presented to all the voters and not based upon race.

I yield back.

Mr. CANADY. Thank you, Mr. Goodlatte.

Mr. Frank.

Mr. FRANK. I'll begin by yielding 90 seconds of my 8 minutes to the gentleman from North Carolina.

Mr. WATT. I just want to deal directly with what Mr. Bolick said, because there's this notion that somehow creating a majority black district—my district happens to be 51.7 percent black. How is that dividing and segregating people any more than a majority white district that happens to be 90 percent white and 10 percent black? What is this notion that you have that somehow a majority of white folks makes something integrated and a majority of black folks makes it segregated? You've got a problem, I think. I mean, I don't understand where you're coming from on this thing.

Mr. BOLICK. Mr. Watt, if you read the Court decisions on this, you will know—

Mr. WATT. I'm not talking about a Court decision; I'm talking about common sense.

Mr. BOLICK. I'm talking—

Mr. WATT. How is this a segregated—I didn't understand it when Sandra Day O'Connor said it. I asked the same question. I've asked it in the press over and over and over again. My lawyers keep saying quit messing with Sandra Day O'Connor; she has to decide your case. [Laughter.]

I've asked her the same question. I keep asking. How is it that you can tell me that a 51/49 percent district, regardless of the split, is segregated and a 90/10 split is integrated?

Mr. BOLICK. If the lines are—if the lines are contorted and distorted in order to bring voters who have nothing in common but the color of their skin together, you have a race-based district.

Mr. FRANK. Let me—

Mr. WATT. I'm happy to hear you say that.

Mr. FRANK. Let me take back—

Mr. WATT. I'm going to win my case.

Mr. FRANK. I've got to take back my time.

Mr. BOLICK. Good luck. Good luck.

Mr. FRANK. I want to take back my time because the unreality of these comments on voting illustrates to me the major problem. See, I think—and I have a lot of sympathy with what Mr. Shaw said—we can't get to a colorblind society by pretending that the racism that now exists doesn't exist, and that's the problem. You have declared that we have one already. Mr. Pendley, you said, well, we got to the colorblind society the day *Adarand* was decided. From your lips to God's ears, but I don't think it's going to happen quite that much. That's the unreality of what you're saying. You gentlemen both deny the reality of continuing discrimination when you talk like this.

Now, Mr. Bolick, you said—and this is just strange to me; it's not logical—you said we've got to have blacks and whites learn to live together, and the way they learn to live together is if you put them in the same congressional district. I don't think you have any idea what being in the same congressional district means. Let me guarantee you, after 15 years of representing a congressional district, that sharing me as a Representative is not a great icebreaker. [Laughter.]

Very few marriages have come about because people say, "Hey, you're in Frank's district. So am I. Let's go out." [Laughter.]

That's just nonsensical. What brings you together is day-to-day life. That's a degree of abstraction and silliness, frankly, that doesn't belong here.

And, in fact, the other problem is this: we have been—the hypocrisy of white people telling the black people—in the first place you say, well, if all they have in common is their race, that's not good enough. How can anybody live through the U.S. history and think that being black in Mississippi isn't about as powerful a common bond as you can have? I was in Mississippi in the summer of 1964 when you could be killed if you were black and tried to vote. And, frankly, at that point, as the Speaker has said, it was the liberals who said we've got to break that down; the conservatives who defended it and who objected, then, to the Civil Rights Act that many conservatives are now for because they can use it as a stick to beat things with.

But let me ask you, do you think in the South today or in a big city in America, in America today is having the same race—is being black not an indicator of some common concerns and interests?

Mr. BOLICK. I would say that other factors are probably more significant. Let me tell you—

Mr. FRANK. Like what? Which ones?

Mr. BOLICK. Like economics.

Mr. FRANK. You think that economics is more important than race? Well, at what point—let me ask you this then.

Mr. BOLICK. Under our Constitution, it is.

Mr. FRANK. No, I'm not talking about under the Constitution—you want to hide behind things—because I'm talking now about the reality. [Laughter.]

Mr. BOLICK. I am happy, I am proud to hide behind the Constitution, Mr. Frank.

Mr. FRANK. Not when we're talking about something totally different. We are talking now about what the reality is. Now you are making the worst mistake of lawyers to think that whatever is constitutional is, therefore—that that ends the question. As a matter of fact, if that's right, then I can live with that because we will be proposing that whatever is constitutional under *Adarand* will be public policy; you'll be opposing it. This suggestion that whatever is constitutional you accept—

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. FRANK. Thank you.

It's just nonsensical because I'm talking about what is constitutional doesn't determine what is, in fact, social reality, and I want you to tell me what—you say economics is more important than

race. Let me ask you, has economics always been more of a common factor than race in America?

Mr. BOLICK. No, it hasn't.

Mr. FRANK. Would you say 50 years ago—

Mr. BOLICK. No, it has not, but—

Mr. FRANK. All right. At what point—was it 50 years ago more of a common factor for a Southern black person than race?

Mr. BOLICK. When the Government was forbidden from using racial factors to classify people, which, unfortunately, it continues doing.

Mr. FRANK. Well, when did—when in the history of the U.S. South did economics become a more important common factor for black people than race, in your judgment?

Mr. BOLICK. I would say the day that official segregation was ended.

Mr. FRANK. In 1954?

Mr. BOLICK. That's right.

Mr. FRANK. Well, I would say this to that: for you to sit here and tell me that, as of the date of the *Brown* decision, economics became a more important factor for people's common interests in the South than race is a confession, frankly, of ignorance about American reality that disqualifies any specific proposals you would make about public policy.

Mr. BOLICK. Mr. Frank—

Mr. FRANK. Mr. Shaw, let me—yes, go ahead.

Mr. BOLICK. May I make one comment?

Mr. FRANK. The notion that in 1954 race stopped being as important as economics, that is a lawyer's belief in the power of the printed page that is very touching, but nonsensical.

Mr. BOLICK. Mr. Frank, if my next door neighbor is black, I have more in common with that person than he has with someone in—

Mr. FRANK. Yes, Mr. Bolick, and in 1954 in Mississippi that wasn't true. You just—I asked you this, and you said to me that, as of the day of the Supreme Court decision—what I'm telling you is that you have got a dislocated view of the world if you think that economics became more important than race for black people in Mississippi in 1954, which you just said.

Mr. BOLICK. And how do we live in 1995, Mr. Frank—

Mr. FRANK. No, but I'm—yes, but we get there at some point, and I'll leave you with that.

Mr. Shaw, on the question we were told—Mr. Goodlatte very graciously said he felt sorry for the minorities that were being hit with a bad tradeoff.

Mr. GOODLATTE. I didn't say that.

Mr. FRANK. Oh, I'm sorry, you said that it was an unfair tradeoff for them, that they were being deprived of their ability to be represented by nicer white people by having stuck in black people's districts.

Mr. GOODLATTE. I didn't say that.

Mr. FRANK. Well, that's what you meant, I thought. But he didn't say that; I said that that's what I thought he meant. [Laughter.]

I want to ask you, why, then, do you think black people are, in fact, being unfairly disadvantaged when there are some districts created this way?

Mr. SHAW. If I may, Mr. Frank, let me just, first, recommend for anyone who's confused about the relationship between economic status and race, "American Apartheid" by Massey and Denton, which talks about the fact that even where African-Americans are of equal economic status, residential segregation on the basis of race continues to be a reality.

With respect to the question you just asked, of course, the great majority of the candidates for whom African-Americans votes continue to be white, and white representatives continue to be elected from majority black districts. I think white people can represent African-Americans, but what I'm opposed to is a segregated body—

Mr. CANADY. I'm sorry, the gentleman's time has expired.

Mr. HOKE.

Mr. FRANK. Well, under the precedent, if he would let Mr. Shaw finish his—

Mr. HOKE. I'd be delighted to, Mr. Frank.

Mr. FRANK. Thank you.

Mr. SHAW. Let me just finish very quickly—what I'm concerned about is segregated legislative bodies which will be unrepresentative, I think, of the American people. That is in no one's interest, and that's what we'll see if these kinds of arguments prevail.

Mr. HOKE. I'd like to begin by sort of turning Mr. Watt's question around a little bit, really for a rhetorical device, and to point out the irony of these voting rights districts. I think that there's something that is never talked about in this whole issue, and that is, what should be our response to polling results which indicate that 80 percent of blacks under no circumstances would ever vote for a white Republican? And I don't know that there should be any response one way or the other, but I will tell you that the result of the minority districts is very, very positive for the Republican Party overall and negative for the Democratic Party overall, and I think that's probably what Mr. Goodlatte was getting at in terms of the impact of these cases.

I guess the partisan in me says, well, that's good for Republicans, bad for Democrats, but I find it to be extremely ironic because that is what's happened. I personally know this very well because I represent northeastern Ohio, where Mr. Stokes' district is next to mine—and I find this particularly ironic because I worked very hard for his brother, Carl Stokes, in his first election to be the Mayor of Cleveland, and he was the first black mayor of a major American city back in 1968 against Taft. But we have a situation where there is a minority-drawn district, and as a result of that, Mr. LaTourette and I have been in a much more favorable climate to win.

I wanted to ask you, Mr. Shaw, because you made a point of making a distinction between the NAACP and the Legal Defense Fund of the NAACP—

Mr. SHAW. Well, it's actually not even the Legal Defense Fund of the NAACP. It's an entirely separate organization.

Mr. HOKE. OK, what is the organization that you represent?

Mr. SHAW. I'm with the NAACP Legal Defense Fund and the initials in our name—it's a historical artifact at this point.

Mr. HOKE. OK, I think that's important because I wanted to know if you heard the questions I asked of Mr. Patrick?

Mr. SHAW. I think I did. I stepped out a few times, but I heard——

Mr. HOKE. Because I asked some questions about the Cleveland school desegregation order——

Mr. SHAW. Yes.

Mr. HOKE [continuing]. And about forced busing.

Mr. SHAW. I heard some of that.

Mr. HOKE. And I believe the NAACP Legal Defense Fund is a party to that.

Mr. SHAW. No, we're not. The NAACP was involved in that case, not the Legal Defense Fund.

Mr. HOKE. All right. So it's the national NAACP. Do you have an opinion about forced busing generally or about that case? I guess if you're not involved in it, it's kind of——

Mr. SHAW. Well, I'm familiar with the Cleveland case, of course, because it was a major desegregation case. And let me just say I think I heard Mr. Bolick indicate that he thinks that school desegregation is important. The unfortunate reality, given the residential patterns in this country, is that if we're going to have significant school desegregation, transportation, which is already a fact of life, has to be a tool.

Whether or not the Cleveland should remain under court supervision is another question. At some point these school districts are going to be released from jurisdiction, and they ought to be. I think, though, the question really is whether the promise of *Brown* is something that we're really committed to as a nation, and I think the answer to that question is really not clear.

Mr. HOKE. What exactly is the promise of *Brown*, in your opinion?

Mr. SHAW. The promise of *Brown* is twofold. As a legal matter, of course, it is that the Government should not segregate students on the basis of race. But, beyond that, I believe that the promise of *Brown* was public education which would prepare students to live in a society that was a diverse society. I believe, I continue to believe, that there is something healthy and worthwhile about children being educated in a desegregated educational environment. Certainly for African-Americans that's true, but it's also true for white Americans and other Americans. That is a promise, though, that we have to——

Mr. HOKE. What do you think of Justice Thomas' concurring opinion where he says it is the most bald and raw kind of racism that claims that a black student cannot get the same kind of education or an equal quality education unless he's sitting next to a white student?

Mr. SHAW. I argued the *Jenkins* case, and I don't disagree with that statement but it totally misses the point. The premise of desegregation is not that black children need to sit next to white children in order to learn. There is nothing inherently——

Mr. HOKE. You said that that's the promise of *Brown*. You said the first promise of *Brown* is that every child should be in a desegregated environment.

Mr. SHAW. No, I——

Mr. HOKE. May I have my 3 additional minutes, please?

Mr. CANADY. Yes, the gentleman will have 3 additional minutes.

Mr. SHAW. That's a very different—it's a very different statement. It's one thing to say that the promise of *Brown* is that we will be educated in desegregated public schools, which will prepare all of us to live in the multicultural society we live in. It's another thing to say that black children have to sit next to white children in order to learn. There's nothing inherently inferior with an all-black—

Mr. HOKE. But how can you have desegregation without having black children sitting next to white children, and vice versa? I mean, it's the same thing, isn't it?

Mr. SHAW. Well, that's right, but the premise is not that black children have to sit next to white children in order to learn, because there's nothing magic about white children that rubs off on black children. The premise is that black children and white children, and all children, are better prepared to deal with our society if they are educated in desegregated environments. Some people believe that; some don't. I believe that's part of the promise of *Brown*.

Mr. HOKE. Well, let me pursue this a little further because, I'll tell you, Cleveland is absolutely colorblind when it comes to the way people feel about this. You know George Forbes, I'm sure?

Mr. SHAW. No, I know—I know who he is and I know—

Mr. HOKE. OK. He's the president of the NAACP in Cleveland. McMickle is a former president. Toliver is a prominent African-American in the community. And I can't think of any black Clevelanders who are pushing for the continuation of mandatory busing at this point.

Mr. SHAW. Many black people are tired of chasing white people; that's absolutely right.

Mr. HOKE. Well, I don't think that's the way they'd characterize it. I mean, they have seen the results, and the results have been the destruction of neighborhoods and terrible economic consequences for the Cleveland city schools.

Mr. SHAW. I don't think we can adequately lay that at the doorstep of desegregation of public schools.

Mr. HOKE. Well, all we know is what we've got. You're right, we cannot absolutely say which was the cart and which was the horse. There is no question about that, but we sure do know what we're faced with today in Cleveland, OH, and we're faced with a school system that is bankrupt, that is in receivership, and is now being run by the State.

Now I agree with you, we cannot lay that all at the feet of the desegregation order, but we know that that's our situation today.

Mr. SHAW. I respectfully say that I hear what you're saying. I think, however, that the reality is that our experience with racial isolation for a number of very complex factors—

Mr. HOKE. You know, I'm going to run out of time and I want to ask one more question.

I wonder if anybody has opinions about the constitutionality of using DBE's, using economic type of criteria, as opposed to using race-based criteria, and what will happen with that.

Mr. SHAW. It doesn't raise a constitutional question. The Constitution is silent when it comes to economic status. It neither protects nor does it discriminate on that basis.

Mr. CANADY. The gentleman's time has expired.

Mr. Conyers.

Now there is a vote going on. So——

Mr. CONYERS. Could I invite the Chair to call the recess now and I'll start when we come back?

Mr. CANADY. If the gentleman would like to do that——

Mr. CONYERS. I'd prefer it.

Mr. CANADY [continuing]. And if our witnesses can stay, we will do that.

Mr. CONYERS. I hope they can. We didn't call the vote. I mean, they understand the votes. [Laughter.]

Mr. CANADY. I understand. I understand. You will be the last questioner, but if you insist, we will——

Mr. CONYERS. Sure.

Mr. CANADY. The committee will stand in recess. We will be back immediately after the vote, and we will be—we will start immediately after the vote.

[Recess.]

Mr. CANADY. The subcommittee will come to order.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I regret as much as anyone the rollcall vote that required us to absent ourselves from the committee for a little while.

But this discussion is of such importance to me because it shows how far away even those of us in positions of responsibility are in terms of the discussion of race in America. Maybe it's a phase we go through, and from a historical point of view everything doesn't just get better and better and better and a little bit better and better, and the charts all show up. I mean, we go up; we go back.

When I first came to the Congress, the right to segregate was being violently advocated on the floor of the House each and every day—interposition, States' rights, and all kinds of theories that now no—very few even ultraconservative Members of the Federal Legislature would dare raise now. To that extent, there is a difference in the debate, which at one time slavery was forcefully advocated as a correct position of this Government. From a historical point of view, I began to see that we have to come through this phase, and we're going to have to take these arguments one by one and wrestle them down to the ground until enough examination and light comes into it.

For example, Mr. Hoke pointed out that 80 percent of the blacks have indicated in polling that they would not vote for a Republican, which rather totally misses the point because 80 percent of the blacks that would not vote for a Republican vote for whites in public office, Democratic, independent, other parties, constantly. Black people have voted for more white people than anybody else. In other words, African-Americans vote for non-African-Americans in far, far greater percentages than any other ethnic group in America votes for someone different from them.

But we have to think our way through. That's a political judgment that most African-Americans have come to base on reality of

where they think their best interest lies in choosing who will represent them. That has little or nothing to do with what the race of the person is.

The next thing that I have to, Mr. Bolick—and I can only pick one instance, but, you know, how more simplistic can we be than to have a person of your great background in this area come up here and say that the solution is the President saying two words: “don’t discriminate.” I mean, first of all, he’d be laughed into the history books, but how on earth would him saying “don’t discriminate,” which he has incidentally said, like every other President, thousands and thousands and thousands of times, but what impact might that have on intelligent men and women on the deep problem of race segregation in America? Now, obviously, it would have absolutely none except to hold him up as a total laughing stock if he were to even be caught considering your advice.

What we are wrestling with now, thankfully, is beyond that. What we’re wrestling with now is, how do we, in fact, end racial discrimination in America? And one way you won’t end it is by more axioms, platitudes, admonitions voluntarily from anybody, including the Chief Executive down. What we need to do, and what is really the basis of this hearing, is: How well are the systems—crude, new, not perfect—that we have in place now, how might they be improved and which direction shall we go in?

My chairman of this committee says let’s end——

Mr. CANADY. The gentleman will have 3 additional minutes.

Mr. CONYERS. Thank you.

The chairman of this committee says let’s end affirmative action as we know it—and I interpret that you do, too—that that will help things. That will help us move around and away from the color of race in the United States. I submit that that is so pathetically shortsighted that there’s no way we’re going to—we can improve this mechanism. We can improve the Department of Justice’s civil rights position. We can endlessly look at all of these cases, some of which are of such small moment that I’m even amazed that we would spend so much time worrying about them, when we have all of the attitude and the culture, the good old boy systems, even built into the Federal Government which itself should be the exemplar of this circumstance.

What we have now is the Government—we’re investigating in the Congress the Government’s law enforcement divisions that are charged with holding back improving the racial climate of this country by the way they conduct their own business inside the Government, and, yet, we meet here to talk about how we further reduce the Government’s opportunities and responsibilities to act under the 13th and 14th amendments and the statutes, the civil rights and voter rights statutes, and others that have come out of it.

I’d now like to open up the discussion to all of you, starting with Mr. Shaw, and as far as the chairman will permit you to go with your comments and responses, if any.

Mr. SHAW. Well, I want to say that I agree with you. I don’t take your statements, Mr. Conyers, as indicating that the bully pulpit that the President has, and that elected officials have, cannot be used effectively. I thought the President yesterday was very effec-

tive in articulating a vision with respect to the kinds of discourse we should be having about race issues.

Mr. CONYERS. And if I may point out, he wasn't saying don't discriminate; he was supporting a specific program for attacking discrimination. Thank you for adding that.

Mr. SHAW. I also would just hasten to add that I think that, obviously, the purpose for which we're here, talking about the oversight hearings and making sure that the Division is effectively carrying out its mission, is a place where we ought to have our focus. And, as I indicated earlier, I believe that there's no question that the resources have to be put there to root out and pursue discrimination.

Mr. CONYERS. Thank you.

Mr. Bolick.

Mr. BOLICK. I think that the concept that I articulated, don't discriminate, is, in fact, a simple proposition. I think that it holds the assent of the overwhelming majority of American people, both white and black.

Mr. Chairman.

Mr. CANADY. The gentleman will have 2 additional minutes—

Mr. CONYERS. Thank you very much.

Mr. CANADY [continuing]. Not to set a precedent for the future [laughter], but since it's only our time here, and the two of us agree, that's not—

Mr. CONYERS. Well, it's for their response. I'm not going to say anything.

Mr. BOLICK. In 1944, when the Supreme Court was presented with a compelling reason to incarcerate Japanese individuals, Justice Jackson described the Government's power to discriminate as a loaded weapon, that if the concept of discrimination would be justified in this instance, that that loaded weapon would be in the hands of any government official who could come up with a plausible enough justification. We have experimented with Government's power to discriminate now for over 200 years in this country, and it seems to me that from an historical standpoint, if there is one lesson that is clear, when Government discriminates on the basis of race, it is never beneficent. And so if we have to turn to simple principles, the principle of nondiscrimination embodied in the 14th amendment, it seems to me, is an awfully good one to turn to.

Mr. CONYERS. Well, that excludes the present state of the law, sir, in which it's been enunciated from Bache on that color can be a valid tool in ending discrimination. I mean, how can you throw out all of that law with a casual statement like that and tell me you're a member of the bar.

Mr. BOLICK. Mr. Conyers, I think that if the strict scrutiny is applied, I think that—I don't remember whether you were here during my opening statement. It's been 41 years since the U.S. Supreme Court has upheld any program under a strict scrutiny standard. If that standard is applied, I don't think that we will have a problem with racial preferences anymore, but I don't think that standard will be applied, and that is why I believe that Congress ought to speak forcefully on this issue and simply get the Government out of the business of discrimination once and for all.

Mr. CONYERS. Well, then how will we end it, then? I mean, by your own argument, how would it end?

Mr. BOLICK. How will racism end?

Mr. CONYERS. Yes.

Mr. BOLICK. First of all, in two ways: (a) by the strict enforcement of the civil rights law, and (b) with Government finally stopping classifying people on the basis of their race.

Mr. CANADY. The gentleman's time has expired.

And I want to thank each of the witnesses for being here today. We appreciate your testimony. It's very valuable.

This hearing is adjourned.

[Whereupon, at 1:58 p.m., the subcommittee adjourned.]

APPENDIX

DEPARTMENT OF JUSTICE SUBMISSIONS TO REPRESENTATIVE EDWARD R. ROYCE'S QUESTIONS

1. What was the basis for the Department's investigation of the City of Fullerton, California? When was the investigation initiated?

As we have stated previously in letters from the Deputy Attorney General and from Kent Markus, it would be inappropriate for the Department to discuss the specifics of the Fullerton matter, because it remains an ongoing investigation.

As a general matter, the Department determines which jurisdictions to investigate based upon information it receives about public employers from a number of sources, including citizen mail, congressional correspondence, and complaints filed with the Equal Employment Opportunity Commission ("EEOC"). The Department also reviews and analyzes census data and EEO data contained in reports submitted by employers to the EEOC relating to employment of minorities and women and, on occasion, other similar reports. This data is analyzed in conjunction with relevant labor market data. If the data reveal a substantial underrepresentation in a particular job category or very low hiring rates relative to the availability in the relevant labor market, the Department may engage in further inquiry pursuant to Section 707 of Title VII to determine whether a violation of law has occurred.

Formal pattern or practice investigations are initiated only upon approval of the Assistant Attorney General for Civil Rights. Immediately after a formal investigation has been approved, a letter signed by the Assistant Attorney General is sent to the employer notifying it of the commencement of the investigation.

2. How does the Department determine which cities to investigate?

Again, as noted above, the Department evaluates information from a variety of sources in determining which public employers to investigate pursuant to Section 707 of Title VII. It initiates investigations if there is statistical or other information indicating that a violation of Title VII may have occurred.

3. If the Department uses statistics as a basis for initiating an investigation, how are factors such as applicant qualifications and interests weighed? What is the statistical model used?

In evaluating the representation of race, ethnic and gender groups in a given employer's workforce and among that employer's recent hires, prior to authorizing a formal

- 2 -

investigation, the Department takes into account job-related, non-discriminatory qualifications required to perform the job(s) in question, to the extent permitted by the data then available to the Department.

Generally speaking, "interest" cannot be accurately measured without application data, and this kind of data is not available to the Department prior to the commencement of a formal investigation. The Department does seek application data during its formal investigations. When such data are made available to the Department, it is carefully reviewed and analyzed. However, such data are not useful for measuring "interest" among race, ethnic or gender groups if the employer is or has engaged in employment practices that effectively discourage individuals from any race, ethnic or gender group from applying. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367-71 (1977).

The statistical model typically used at the investigative stage assesses the probability that underrepresentation of a race, ethnic or gender group in an employer's workforce could be the product of chance rather than unlawful discrimination. See, e.g., Hazelwood School District v. United States, 433 U.S. 299, 308-309 n.14 (1977).

4. To the extent the Department relies upon anonymous complaints, how does it verify the legitimacy of claims and allegations?

Generally, the Department does not rely on anonymous complaints. As with any information, the Department investigates to verify the legitimacy of any claims or allegations made by individuals concerning an employer's practices. Typically, we attempt to locate and review all relevant data, documents and/or witnesses before determining whether the allegations of unlawful practices are true or false. After the commencement of a formal investigation, this is frequently done with the assistance and cooperation of the employer.

5. What type of findings are provided to the city following completion of an investigation before or at the time a consent decree is presented?

As a general matter, if the Department determines that the city is engaged in unlawful discriminatory conduct, we send a letter to the employer at the completion of an investigation, setting forth the results of the investigation, informing the employer that a lawsuit has

- 3 -

been authorized, and inviting the employer to engage in settlement negotiations as an alternative to litigation.

When the consent decree is presented in the course of settlement negotiations, the Department offers to discuss the proposed relief provisions and the factual basis for those provisions. Often, our experts are made available to discuss with the employer the factual foundation for the decree provisions.

6. If no intentional discrimination is found but there is reason to believe a city could perform more effectively in recruiting minorities, what type of positive program is suggested by the Department -- or does the Department simply rely upon intimidation [e.g. "We will sue you so you better sign a consent decree"]?

If a violation of law is found, the Department first seeks an appropriate voluntary resolution through negotiation to avoid a trial. Typically, in order to stimulate and promote settlement negotiations, the Department will provide to the employer a proposed consent decree. If recruitment is in issue, the proposed decree will include a comprehensive recruitment program based upon decrees that we have entered in the past with other employers. However, the Department attempts to make clear that the proposed decree is simply a starting point for negotiations and that modifications may be made to address a given employer's concerns and constraints, as long as the end result is an effective remedy for the violation of law.

If the investigation is concluded and no violation of law is found, the employer is informed, and no further action is taken.

7. Who in the Department decides whether to proceed against an agency?

The Attorney General has delegated this power to the Assistant Attorney General for Civil Rights.

8. What is the Division's budget for litigation? What is the budget for development of model programs for correcting discrimination? Is any solution offered other than litigation or consent decrees?

Most of the Division's budget goes for litigation generally. The Employment Litigation Section's budget for Fiscal Year 1995 was \$5.8 million.

- 4 -

The Department of Justice is a law enforcement agency and Congress has given it no authority or budget to provide technical assistance to employers for employment discrimination cases. That role has been assigned to the EEOC under Title VII of the Civil Rights Act of 1964. Thus, in the context of employment discrimination on the basis of race, sex, national origin and religion, the Department does not give advisory opinions or develop model programs for correcting discrimination. However, models could be drawn from any number of our consent decrees, and we have worked closely with employers under consent decrees to help them develop effective recruitment programs and job-related selection devices.

We seek litigated orders or consent decrees to resolve our cases where a pattern or practice of discrimination is alleged to ensure that the due process rights of third parties potentially affected are preserved and to ensure that the settlement is readily enforceable. In limited situations, when no prospective relief is needed to remedy the violation, we have begun to enter into out of court agreements to resolve individual charges of discrimination.

9. How far back does the Department go in investigating and analyzing a public agency's employment practices? Is there a limit or statute of limitations on such matters?

For state and local governments, employment discrimination has been illegal under Title VII since 1972. Title VII does not contain a statute of limitations applicable to the Department of Justice when it proceeds under its pattern or practice authority. We customarily do not seek back pay more than two years prior to the date that the employer was first placed on notice of a Title VII violation of the nature alleged in our complaint. As a general matter, discrimination that ended years ago is of far less concern to the Department than ongoing acts or patterns of discrimination or more recent discrimination.

10. What constitutes an "approved" written exam? Does the Department have any approved tests that a city could use for such occupations such as police officer or fire fighter that can provide a safe haven from DOJ challenge?

Section 105(a) of the Civil Rights Act of 1991 requires an employer that has used a written exam with an adverse impact against a race, ethnic or gender group to demonstrate that the exam is job-related for the position in question and consistent with business necessity. See also Griggs v. Duke

- 5 -

Power, supra; Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The Department routinely retains experts to review evidence of job-relatedness. Over the years there have been exams developed by employers which the Department has reviewed and concluded are appropriately job-related to the particular positions in question. In addition, the Division has provided expert counsel and advice to defendants under consent decrees during the development of job-related selection procedures. After the employer has implemented a test which the Department has found to be job-related, and therefore lawful, the Department does not object to the use of that test and in some instances has agreed to join the employer in defending such tests from challenges by third parties.

Due to differences in job content and working conditions, there are no "one size fits all" tests (even in jobs that seem very similar to the layperson), although job-related tests can sometimes be adapted to different jurisdictions if validation procedures are followed.

11. If a city has operated in good faith based upon a test that has been validated by psychological experts, is that acceptable, or must the city prove the validity of its tests? How does it do that?

The law requires that if an employer's test has an adverse impact on a race, ethnic or gender group, the employer must demonstrate the job-relatedness of its test. Adverse impact is not excused by a "good faith" or detrimental reliance on an expert's opinion or recommendation. See Griggs v. Duke Power, supra. The law places on the employer the responsibility to determine that its employment tests are valid. Through documentation, the employer must show that its expert performed a validity study that meets professional testing standards.

12. Is there a point where common sense would dictate that the process is not cost effective to DOJ or the city involved? Is any analysis done by the Department to determine the actual benefit to employees and employers of a particular course of action or demand, in order to insure the proper expenditure of public funds, federal and local?

The responsibility of the Department is to enforce the law. A concerted effort is made by the Department to remedy violations of federal civil rights law by consent decree, thereby eliminating the expense of litigation. The

- 6 -

Department does not require employers to hire unneeded employees, to hire, transfer or promote anyone who is not qualified, or to hire or promote any lesser qualified individual over a more qualified individual. Rather, it works with employers to come to a negotiated solution, consistent both with the employer's business needs and enforcement of Title VII.

Unlawful discrimination presents a large, but not easily quantifiable, cost to society. Remedies to address unlawful discrimination take this into account, especially in the context of a negotiated settlement by consent decree.

13. Does the Department require cities to set goals for employment of minorities and then monitor them? For how long?

In order to remedy violations of Title VII, the Department seeks to have employers adopt, as appropriate, affirmative recruitment measures and non-discriminatory employment practices, as well as remedies for victims of discrimination, (e.g., reinstatement, back pay, damages, pension and seniority relief). Consistent with constitutional and Title VII standards, when hiring, promotional or long-term goals are necessary to eradicate the discriminatory practice in question, the Department seeks such goals.

The duration of our recently entered consent decrees typically ranges from three to five years, although under their terms, their length can be extended if the district court determines that the purposes of the decree have not been substantially fulfilled.

The Department monitors consent decrees for their duration to ensure that the employer is implementing them in good faith.

14. What equal treatment protection is afforded to potential non-minority applicants when a consent decree is in effect? Will non-minority applicants who possess equal or better qualifications be discriminated against? Doesn't this mean innocent non-minority applicants pay part of the price of a settlement?

In any case involving class-wide relief, as a matter of policy, a "fairness hearing" is conducted before the court to determine that the proposed decree meets the requirements of federal law. One of the primary purposes of the fairness hearing is to ensure that the court hears and considers the views of those groups and individuals who wish to challenge

- 7 -

the consent decree's lawfulness and may be adversely affected by its terms. This is one of the principal reasons that a court-approved consent decree is required in pattern or practice cases; an out-of-court settlement does not permit a judicial determination of whether the proposed remedy is fair and just to all persons whose interests may be affected by the decree.

If an employer is using a legal selection device (i.e. job-related for the position in question and consistent with business necessity), it can continue to do so even if the device has an adverse impact on minorities. However, if selection devices do not accurately measure qualifications for the position in question, use of such devices cannot be used to draw the conclusion that any applicant is "equally or more qualified" than another.

15. What is the Department's past record regarding the temporal duration of consent decrees?

As noted above, most of our recently entered consent decrees resolving pattern or practice cases today last from 3 to 5 years. In the past, consent decrees had no specific termination date, but remained in effect until it could be demonstrated that the purposes of the decree had been satisfied.

16. What does the Department record reflect regarding the number of individual claims for compensation under consent decrees in disparate impact cases vs. the actual number of claims approved?

In our consent decree cases, an average of one-half of individuals who file claims for compensation pursuant to the terms of the decree actually receive awards of relief. This data is based on our experiences in large pattern or practice cases, e.g., the State of Georgia, Mississippi State Department of Public Welfare, the Louisiana Department of Transportation & Development, the Delaware Department of Corrections and the Florida Department of Corrections.

17. In pursuing disparate impact claims in occupations requiring a high level of skills for entry, such as police and fire fighters, how does the Department determine the number of eligible claimants? Are general population statistics used, or "qualified" population statistics? If the latter, how is the body of qualified people defined? Does the Department have any programs to help people become qualified?

- 8 -

Each case requires an individualized determination of the relevant labor market. There may be questions whether a job in fact requires a high level of education and/or skill for entry, or whether employees are placed in training programs or trained on the job. As a general matter, in identifying the relevant labor market the Department takes into account all bona fide, nondiscriminatory qualifications necessary to perform the job immediately upon hire. The Department uses information sources such as census data, EEO reports or applicant flow reports to determine the percentage of qualified persons within the labor force and the number of claimants potentially eligible for relief. Other standard-setting authorities may provide helpful guidance as to qualifications necessary for a job. Many of our consent decrees require the employer to establish training programs for applicants to assist in preparing them for written and physical tests.

Claimants can receive awards of relief only if they meet all bona-fide, non-discriminatory qualifications for the job necessary to perform the job immediately upon hire.

18. Why does the Department insist on court-ordered consent decrees as opposed to some other method of compliance assurances?

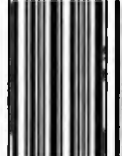
We seek litigated orders or consent decrees to resolve our cases where a pattern or practice of discrimination is alleged to ensure both that third parties who may be potentially adversely affected by the relief have the opportunity to present objections to the court and that the settlement is enforceable in court.



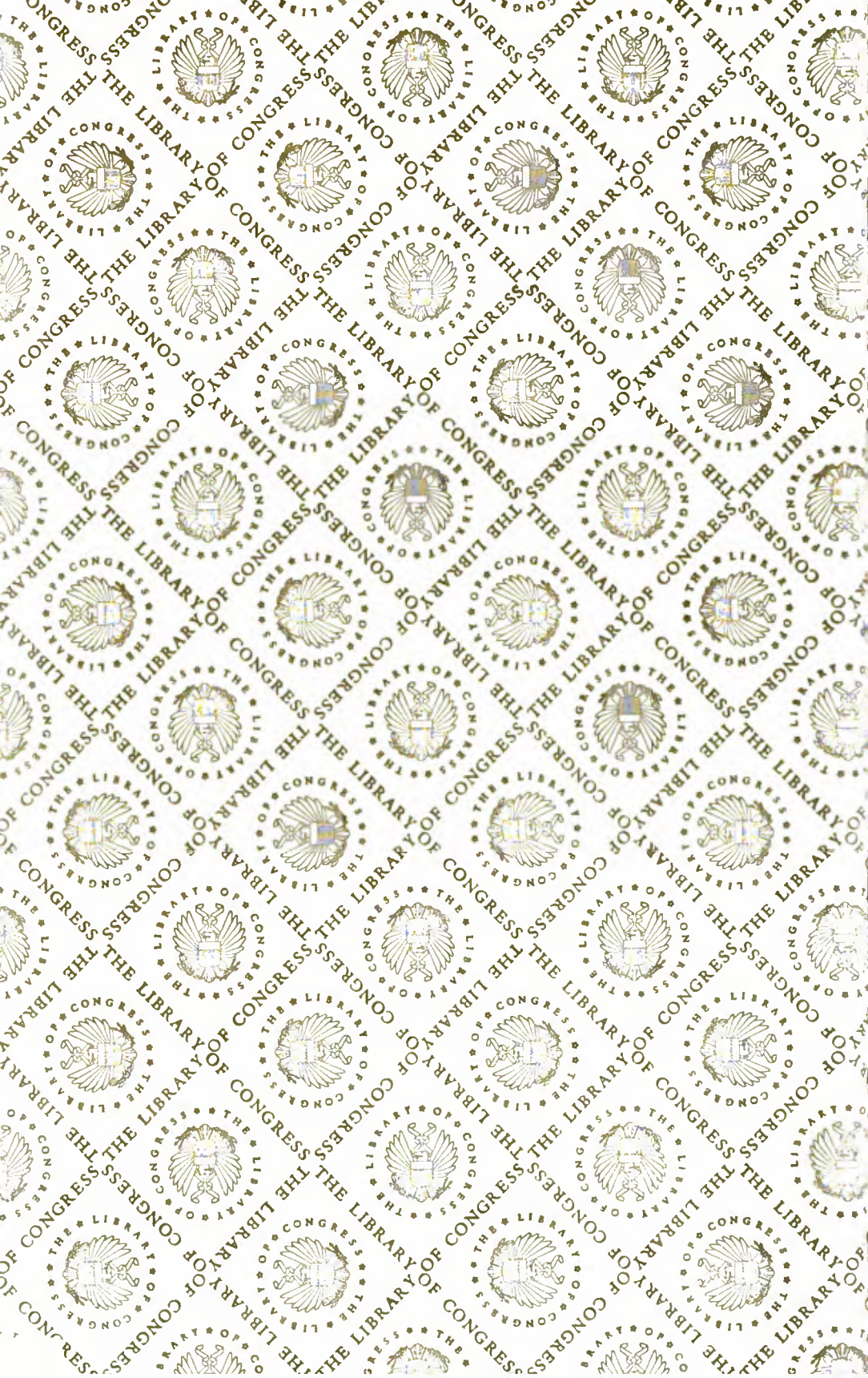
ISBN 0-16-052835-6



90000



9 780160 528354





HECKMAN
BINDERY INC.
5-84-974
Bound To Please
N MANCHESTER,
INDIANA 46962

